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Supreme Court, U.S.
FILED
No. 97-971719 APR 2 1 1998
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DEBORAH RHETT,

Petitioner,

v.

CARNEGIE CENTER ASSOCIATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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129 pp

QUESTIONS PRESENTED

1. Does a company that allows an employee to take an unpaid pregnancy leave, but then abolishes her job as part of a reduction-in-force solely on the ground of her being on leave from the workplace, violate Title VII and the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), which defines discrimination "on the basis of sex" to include discrimination "on the basis of pregnancy, childbirth, or related medical conditions"?

2. Does an employer's admission that in carrying out a reduction-in-force, it terminated an employee while she was on pregnancy leave because of her absence from the workplace, constitute "direct evidence" of discrimination on the basis of pregnancy and because of sex under the principles of *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985)?

3. Under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) line of decisions, after a plaintiff challenging her employer's decision to terminate her while she was on pregnancy leave establishes a *prima facie* case, does an employer satisfy the requirement that it articulate a "legitimate, nondiscriminatory reason" for that decision by asserting that the plaintiff was fired because of her absence from the workplace on that leave?

4. Under the *McDonnell Douglas Corp. v. Green* line of decisions, is proof of "pretext" in a pregnancy discrimination case limited to a showing that the employer treated the plaintiff differently than non-pregnant employees on disability leave?

PARTIES

The parties are all shown in the caption. Respondent is not a publicly held corporation but is a partnership.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Deborah Rhett respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit entered in this proceeding on December 30, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 129 F.3d 290 and is set out at pages 1a-47a of the Appendix hereto ("App."). The Opinion of the United States District Court for the District of New Jersey is unreported and is set out at pages 48a-77a of the Appendix. The Opinion of the Bankruptcy Court for the District of New Jersey is unreported and is set out at pages 78a-92a of the Appendix. The Order of the Court of Appeals denying petitioner's timely Petition for Rehearing and denying, by an equally divided court, the suggestion for rehearing *en*

banc, is unreported and is set out at pages 93a-94a of the Appendix. The Judgment of the Court of Appeals, issued in lieu of a mandate, and dated December 30, 1997, is set out at pages 95a-96a of the Appendix.

JURISDICTION

The opinion of the Third Circuit was entered October 31, 1997. Petitioner filed a timely petition for rehearing and suggestion for rehearing *en banc*, which was denied on December 22, 1997. (App. 95a-96a.) Justice Souter, as Circuit Justice, granted petitioner's motion to extend the time for filing the petition for a writ of certiorari to and including April 21, 1997. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k),[1] which provides in pertinent part:

> The terms "because of sex" or "on the basis of sex" include. but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) shall be interpreted to permit otherwise.

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[1]July 2, 1964, P.L. 88-352, Title VII, § 701, 78 Stat. 253; Oct. 31, 1978, P.L. 95-555, § 1, 92 Stat. 2076.

STATEMENT OF THE CASE

A. Proceedings Below.

Petitioner Deborah Rhett filed an action on November 26, 1993, in the United States District Court for the District of New Jersey under Title VII of the Civil Rights Act of 1964, as amended, and the New Jersey Law Against Discrimination against her former employer, respondent Carnegie Center Associates (hereinafter "Carnegie").[2] The complaint alleged discrimination on the basis of her gender, race, and marital status when petitioner was terminated from her employment during a reduction in force at the company.

Because Carnegie was then undergoing bankruptcy reorganization, the Title VII action was automatically stayed and petitioner pursued the matter by filing a proof of claim with the bankruptcy court on February 19, 1994. The district court terminated the Title VII action without prejudice and the case continued in the bankruptcy court. The bankruptcy court held a three-day bench trial and found in Carnegie's favor. (App. 78a-92a.)

The district court affirmed the decision of the bankruptcy court. (App. 48a-77a.) Petitioner appealed to the Court of Appeals for the Third Circuit, which affirmed the decision of the district court by a divided vote. (App. 1a-47a.) Petitioner timely sought rehearing and rehearing *en banc*, which were denied, with the suggestion for rehearing *en banc* being denied by an equally divided court. (App. 93a-94a.)

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[2]The complaint also alleged jurisdiction pursuant to 42 U.S.C. § 1981 with regard to petitioner's claims of racial discrimination. Those claims are not at issue in this proceeding.

B. Statement of Facts.[3]

Petitioner was initially employed by respondent Carnegie in April, 1989, and became a full-time permanent secretary in Carnegie's Accounting/Finance Department on July 17, 1989. She received a salary increase of $1,500 in January, 1990, based on her satisfactory performance. (App. 2a, 80a.)

In June, 1990, petitioner informed her supervisors and co-workers that she was pregnant. (App. 2a, 82a.) On December 18, 1990, she circulated a memorandum to managerial officers (including Carnegie's owner, Alan Landis, its controller, Keith Gormisky, and the chief financial officer and counsel, Gary Turndorf), stating that she planned to be on maternity leave from December 21, 1990, until about April 15, 1991. (App. 21-31, 83a.) Carnegie hired a temporary secretary, whom petitioner trained prior to starting her leave, to fill in while she was gone.

Carnegie did not have a written maternity leave policy, but Turndorf testified that its practice was to "try to hold it open for them if we could" so that "[w]hen they wanted to come back, if they contacted us and there was something open that was suitable, we would offer it to them." (App. 3a, 82a.) During Rhett's absence (until her termination), Carnegie continued her medical coverage (App. 3a n.1, 8a, 85a), and its records indicated that she was still an employee of the corporation. (App. 3a n.1.)[4]

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[3]We here set forth only the facts relevant to the issues raised in this Petition.

[4]While the bankruptcy court and the district court viewed petitioner as "not working for the company" once her pregnancy leave had started (App. 70a, 92a), the court of appeals did not affirm their judgments on this ground. Instead, the panel noted, "it appears that

Carnegie was experiencing financial difficulties before petitioner took her maternity leave, and these difficulties worsened while she was out on leave. The company was forced to make staff cutbacks to decrease costs and eliminated several positions just before petitioner was scheduled to return to work. Specifically, Carnegie decided to reduce the number of secretarial positions, and Gormisky wrote petitioner on March 26, 1991, to tell her that her position had been eliminated.[5] This was the first indication to petitioner that she would not be able to return to work after her pregnancy leave. (App. 84a ¶¶ 32, 33.)

Turndorf testified that Carnegie did not make a performance-based evaluation as to which secretaries should be retained to fill the remaining number of positions within the company (App. 3a; *see also supra* note 5) but rather did not consider petitioner to be an employee of the corporation once she took leave, so that petitioner was not "let go" when Gormisky wrote to her on March 26, 1991. (App. 70a (quoting trial testimony).)

Petitioner remained "under medical care" at the time Gormisky sent her the notice that her position was

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Rhett was an employee of Carnegie on an unpaid leave of absence" at the time of her termination. (App. 8a.)

[5]The bankruptcy court suggested that prior to abolition of Rhett's job there had been five secretarial slots. (App. 89a.) The court of appeals described the reduction as "from four to three." (App. 4a.) The difference is unimportant to the disposition of this case because it is undisputed that the secretarial positions were interchangeable (*see* App. 80a ¶ 7) and that Rhett's job was not eliminated because the position was uniquely unnecessary or because her qualifications were adjudged inferior to those of other incumbent secretaries — but simply because "she was not working for the company at the time" she was on leave. (App. 3a-4a, 92a.)

being abolished. (App. 4a, 8a.) However, after she received that letter, petitioner asked about two other positions with Carnegie and was told that they were not available to her. Carnegie did not interview petitioner or consider hiring her for any other position. (App. 4a.)

C. The Bankruptcy Court's Ruling.

The bankruptcy court rejected petitioner's Title VII claim. In its view, petitioner had failed to establish a *prima facie* case since her employment ended when she "left to have a baby" and she "had no absolute right to keep her job." (App. 88a.) Even assuming the existence of a *prima facie* case, the bankruptcy judge concluded that petitioner's claim failed because she could not establish that Carnegie's reduction in force was pretextual: "the uncontradicted testimony of the debtor establishes that the debtor had to let someone in the secretarial group go and the fact that Rhett was not working for the company at the time made it logical that she be the one." (App. 92a.)

D. The District Court's Decision.

The district court affirmed the bankruptcy court's determination. It agreed that petitioner had not established a *prima facie* case because:

(1) Carnegie had no leave policy but only an "informal [practice of rehiring] . . . individuals [on maternity leave] if the circumstances at the time of the employee's return warranted doing so" (App. 67a);

(2) Carnegie "did not consider [petitioner] to be an employee there on March 26, 1991 when Gormisky notified her that C[arnegie] abolished her position" (App. 70a); and

(3) the bankruptcy court's finding that "the secretarial position held by appellant was abolished for legitimate, non-discriminatory reasons" (Carnegie's "severe financial difficulties") was "not clearly erroneous" (App. 73a).

E. The Decision of the Court of Appeals.

As previously indicated, the court of appeals concluded that petitioner remained "an employee of Carnegie on an unpaid leave of absence" until March 26, 1991. (App. 8a.) Accordingly, the court of appeals framed the issue on appeal as "whether an employee's absence on maternity leave can be a legitimate non-discriminatory reason for her termination." (App. 5a.)[6]

The court recognized that "Carnegie terminated an employee who had performed satisfactorily solely because of an economically justified reduction in force while she was away on maternity leave." (App. 11a.) In addition, "Carnegie had need after Rhett was gone for an employee to do the type of work she did before it eliminated her position" (App. 12a), and "fired Rhett because she was on leave rather than . . . [deciding] which secretary's position to abolish on the basis of seniority or merit . . . ." (App. 14a.)

Nevertheless, a majority of the court of appeals panel held that Carnegie's action in selecting petitioner for termination did not *directly* violate the Pregnancy

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[6]The court of appeals held that "the bankruptcy and district courts erred in finding that Rhett did not make out a *prima facie* case of pregnancy discrimination" but ruled that "the error was harmless [because] Carnegie asserted a legitimate non-discriminatory reason for Rhett's termination, that she was away on leave [and] Rhett has not satisfied her burden of showing that this reason was pretextual." (App. 14a-15a.)

Discrimination Act (PDA) because "the mere consideration of an employee's absence on maternity leave is [not] a *per se* violation of the PDA." (App. 7a n.3, 13a.)

Even though petitioner's absence from the workplace while on leave was caused by "pregnancy or related medical conditions," the court ruled that petitioner could obtain relief only by "showing that Carnegie treated her differently than it would have treated a non-pregnant employee absent on disability leave." (App. 13a.)

> We acknowledge that arguably it was unfair for Carnegie to fire Rhett because she was on leave rather than to decide which secretary's position to abolish on the basis of seniority or merit, but it was not illegal for it to do so unless it would not have eliminated the position of another employee on disability leave who was not pregnant.

(App. 14a.) At the same time, the panel majority conceded that such a showing "was difficult . . . because Carnegie never has had an employee on disability leave for a protracted period for a reason other than pregnancy." (App. 13a.)

Judge McKee dissented at length on the ground that, because petitioner's absence was due solely to her pregnancy, it was illegal sex discrimination to select her for termination because of that absence. (App. 19a-47a.)

> Pregnancy and absence are not, however, analytically distinct, and an employer can not punish for the absence occasioned by pregnancy under Title VII. As noted above, that statute states that it is an unlawful employment practice to "discharge any individual . . . or otherwise discriminate . . . because of sex," 42 U.S.C. §2000e-2(a)(1), and, after the PDA, that includes

> discrimination "on the basis of pregnancy . . . or related medical conditions." 42 U.S.C. §2000e(k). That protection is meaningless unless it is intended to extend to the "temporary" absence from employment that is unavoidable in most pregnancies. Thus, the absence endemic to pregnancy, unlike factors that may sometimes be a proxy for age, has to be protected under the facts of this case.

(App. 38a.) In Judge McKee's view, "Carnegie's action [wa]s the functional equivalent of terminating Rhett because she was pregnant," just as the Second Circuit held in *Teahan v. Metro-North Commuter R.R. Co.*, 951 F.2d 511 (2d Cir. 1991), *cert. denied*, 506 U.S. 815 (1992) that "'an employer "relies" on a handicap when it justifies [its employment decision] based on conduct caused by that handicap.'" (App. 44a-45a.) For that reason, Judge McKee would have "remanded for a determination of whether Rhett would have been selected for termination based upon factors other than her absence." (App. 47a.)

As noted above, the judges of the Third Circuit were equally divided, by a 6-6 vote, as to whether to grant rehearing *en banc* on this issue.[7]

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[7]Judge Wellford, of the Sixth Circuit, sat by designation on the panel and was the deciding vote to affirm the lower courts' decisions. He did not participate in the vote whether to grant rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT QUESTION AS TO THE MEANING OF THE PREGNANCY DISCRIMINATION ACT CONCERNING WHICH THE CIRCUITS ARE IN CONFLICT

This case presents an important question as to the correct interpretation of the Pregnancy Discrimination Act that should be resolved by this Court. The decision below is based on a narrow reading of the statute that makes its first clause meaningless and surplus.

The court of appeals recognized that Title VII bars "employment discrimination based on an individual employee's sex" and that the Pregnancy Discrimination Act amended Title VII so that "[t]here is employment discrimination whenever an employee's pregnancy is a motivating factor for the employer's adverse employment decision." (App. 6a.) Yet in essence, the court of appeals held that a pregnant woman's absence from work, even though indisputably because of her pregnancy and a related medical condition, constituted a "legitimate, nondiscriminatory reason" for choosing her to be terminated while retaining non-pregnant employees in positions interchangeable with hers. The court thus drew a distinction between "pregnancy" and absence resulting directly from pregnancy, establishing that distinction as the line between permitted conduct and prohibited discrimination.

Having found that the employer had advanced a "legitimate, nondiscriminatory reason" that met its burden under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the court below further held that the *only* way that petitioner could show pretext was

to demonstrate that other employees were absent because of disability at the time of a reduction in force at the company but were not terminated.

By these holdings, the court of appeals collapsed the two clauses of the PDA, and rendered the first meaningless. The first clause of the statute (see *supra* p. 2) provides that discrimination "because of sex" shall include discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." The second clause, separated by a semi-colon, provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." The plain meaning of the first clause is that the discriminatory treatment of a woman because of her pregnancy constitutes discrimination based on sex in violation of the statute.

This Court and individual Justices have recognized the broad sweep of the first clause:

> [T]he first clause of the PDA reflects Congress' disapproval of the reasoning in *Gilbert* [citation omitted]. Rather than imposing a limitation on the remedial purpose of the PDA, we believe that the second clause was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied.

California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 284-85 (1987). "The meaning of the first clause is not limited by the specific language in the second clause, which explains the application of the general principle to women employees." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 688 (1983) (Rehnquist, J., dissenting). In contrast to this

Court's understanding of the statutory structure, decisions of the lower courts exhibit great confusion.[8]

In the present case, petitioner Rhett was absent from work solely because of her pregnancy and a related medical condition; to terminate her because of her absence was to terminate her because of her pregnancy, a violation of the statute on its face.

The contrary conclusion of the court below brings to mind Justice Frankfurter's observation, in a different context, that the Fourteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination," *Lane v. Wilson*, 307 U.S. 268, 275 (1939). This Court has consistently eschewed an unduly literal or mechanical interpretation of Title VII's proscription of discriminatory treatment. *E.g.*, *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 188-89 (1991) ("In its use of the words 'capable of bearing children' in the 1982 policy statement as the criterion for exclusion, Johnson Controls explicitly classifies on the basis of potential for pregnancy. Under the PDA, such a

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[8]*Compare, e.g., Maganuco v. Leyden Community High School Dist. 212*, 939 F.2d 440, 444 (7th Cir. 1991) (PDA's "scope is limited to policies which impact or treat medical conditions relating to pregnancy and childbirth less favorably than other disabilities"); *Crnokrak v. Evangelical Health Systems Corp.*, 819 F. Supp. 737, 741 (N.D. Ill. 1993) (suggesting that two clauses of statute generate "seemingly irreconcilable interpretations"); *with, e.g., Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) (second clause "provide[s] additional protection to those 'women affected by pregnancy, childbirth or related medical conditions'"); *Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413, 424 (1st Cir. 1996) (reading PDA to protect employees from discharge because of "short-term inability to work [that] is bound up with the very nature of pregnancy and childbirth," and to allow "an employer [to] discharge an employee while she is on a pregnancy-induced leave so long as it does so for legitimate reasons unrelated to her gravidity").

classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination"); *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 7809 (1978) ("Actuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex. But a statute that was designed to make race irrelevant in the employment market, *see Griggs v. Duke Power Co.*, 401 U.S. 424, 436, could not reasonably be construed to permit a take-home pay differential based on a racial classification") (footnotes omitted).

The court below interpreted the PDA to make illegal only a policy or practice of treating a pregnant woman differently from a non-pregnant but otherwise disabled employee. Such disparate treatment obviously falls within the plain language of the second clause but hardly can be said to delimit the scope of *either* clause.[9]

Whether the PDA should be interpreted narrowly, as did the Third Circuit, or broadly to cover employment decisions that are based on conditions, such as absences from the job site, that are inherent in pregnancy is a question of great importance. A narrow interpretation will mean that during the absences that inevitably occur during every pregnancy, women will be subject to being terminated or otherwise adversely affected because they

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[9]The court of appeals read the second clause more narrowly that its language requires. The statute is not limited, in its terms, to a comparison to other employees suffering a disability. Rather, it encompasses treatment different from that accorded *any* "other persons not so affected [by pregnancy] but similar in their ability or inability to work." Here, petitioner contends, the proper comparison group includes the other incumbents of the secretarial positions interchangeable with hers, each of whom was not "affected" by pregnancy at the time of the reduction in force, but each of whom was (unlike petitioner) kept on as an employee.

are absent.[10] The only circumstances in which they can be protected from discrimination caused by effects of pregnancy will be in the rare instances in which an employer can be shown not to subject employees who are given leave for other reasons to adverse treatment.

The courts of appeals are in conflict over the question whether an adverse employment decision may legally be based on some action or behavior by an employee that is inextricably connected to a characteristic or condition protected by an anti-discrimination statute. In the present case, the sole basis articulated by Carnegie for terminating petitioner was her absence from the workplace due to her pregnancy and the unpaid leave

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[10]As the majority of the court below noted, the Family and Medical Leave Act (FMLA) requires employers (as that term is defined in the statute) to grant leave (which may be unpaid leave) to employees for medical conditions or childbirth and, except for certain highly compensated employees, to restore employees who have taken such leave to the same or an equivalent position upon their return to work. 29 U.S.C. §§ 2612(a)(1)(A), (D), 2612(c), 2614(a), (b). The FMLA has no impact upon this case. Rhett's termination preceded its enactment in 1993 and the statute did not take effect until that year, *see* Pub. L. No. 103-3, § 405, 107 Stat. 6, 26 (1993). Moreover, as the court below recognized (App. 19a n.5), the law excludes companies with fewer than 50 employees from its definition of "employer," 29 U.S.C. § 2611(4), and Carnegie has fewer than 50 employees.

Notwithstanding enactment of the FMLA, PDA protections against discrimination based on pregnancy continue to be of critical importance to large numbers of individual workers. In 1994, the Bureau of the Census reported that there were more than 25.3 million individuals in the United States employed by firms that had less than 20 employees in all, out of a total of more than 96 million workers. (Census statistics do not distinguish among firms employing more than 20 but less than 100 workers.) ECONOMICS AND STATISTICS ADMIN., BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1997, at 544 (Table No. 844) (1997).

which (in the view taken by the court below) she was granted. The court below held that despite the connection between petitioner's pregnancy and that leave, the company had advanced a nondiscriminatory reason for discharging her. *Compare, e.g.*, 3 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 47.07[3] at 47-51 (2d ed. 1995) ("Some leave accompanying childbirth is a necessity, and a policy of denying it, with discharge as the alternative, is tantamount to a policy of outright discharge for pregnancy").

The Third Circuit followed the interpretation of the PDA by the Seventh Circuit in *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994), which held that a pregnant employee could be discharged because of repeated instances of tardiness, even though the tardiness was caused by her pregnancy. (App. at pp. 9a-10a.) The First Circuit, on the other hand, would have come to a contrary result. Both the majority and the dissent below recognized the inconsistency between *Troupe* and *Smith v. F.W. Morse & Co.*, 76 F.3d 413 (1st Cir. 1996). The First Circuit interpreted the PDA as requiring that "an employer must put an employee's pregnancy (*including her departure on maternity leave*) to one side in making its employment decisions." 76 F.3d at 424, quoted at App. p. 10a and 42a (emphasis added by the court below).[11]

As the dissent below also noted, the decisions in this case and in *Troupe* are also in conflict with decisions of the Second Circuit interpreting the Rehabilitation Act of 1973, 29 U.S.C. § 794. (App. at pp. 43a-47a) In

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[11]In *Smith* the First Circuit held that the elimination of the plaintiff's job during a reorganization did not violate the PDA because the employer did not take the action because the plaintiff was absent, but for reasons unrelated to her pregnancy, *i.e.*, her position was unique.

Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511 (2d Cir. 1991), *cert. denied*, 506 U.S. 815 (1992), the Second Circuit held that it violated the Act for an employer to fire an employee because of absenteeism that resulted from a handicap. Similarly, in *Cushing v. Moore*, 970 F.2d 1103, 1108 (2d Cir. 1992), the Second Circuit reiterated the rule that if "an employee's conduct (such as absenteeism), which forms the articulated basis for a job termination is actually caused by a handicap," then there is a violation of the Rehabilitation Act.

The importance of the issue presented by this case is vividly demonstrated by the 6-6 vote by the Third Circuit over whether to grant rehearing *en banc*. This Court has granted certiorari on a number of occasions where there has been a split among the judges in a circuit and the case involves an important issue unresolved by this Court. *See Oil Workers Union v. Mobil Oil Corp.*, 426 U.S. 407, 412 (1976) (reviewing an 8-6 *en banc* decision); *Miree v. DeKalb County*, 433 U.S. 25 (1977); (reviewing an 8-6 *en banc* decision); *Rinaldi v. United States*, 434 U.S. 22 (1977) (reviewing a 7-6 *en banc* decision). As Chief Justice Rehnquist has stated:

> The sharp split amongst the judges who considered this case below demonstrates that our past precedents do not conclusively address the issues central to this dispute. In the same manner that we expect considered and deliberate treatment by these courts, we have a concomitant responsibility to aid them where confusion or uncertainty in the law prevails.

Ratchford v. Gay Lib, 434 U.S. 1080, 1082 (1978) (Rehnquist, J., dissenting.) This is particularly true when the case involves a recurring and important issue or where there is "widespread conflict among the circuits." *Commissioner v. Estate of Bosch*, 387 U.S. 456, 457 (1967).

II.

THIS CASE PRESENTS IMPORTANT ISSUES CONCERNING THE ALLOCATION OF EVIDENTIARY BURDENS UNDER *THURSTON* AND *MCDONNELL DOUGLAS/BURDINE* IN EMPLOYMENT DISCRIMINATION CASES

As discussed above, the central issue in this case is whether the termination of an employee because of conduct (here, absence from work) caused by pregnancy or some other protected characteristic, violates federal anti-discrimination laws, specifically Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act. The decision of the court of appeals that there was no violation in these circumstances infected its resolution of the remaining evidentiary issues in the case and resulted in the application by the court of incorrect evidentiary rules that conflict with this Court's decisions in *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985), *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). This case therefore raises important issues involving the allocation of the burden of proof in actions brought under Title VII and other federal anti-discrimination statutes.

1. Petitioner argued below that the elimination of her position because she was absent from the workplace due to her pregnancy and childbirth was a direct violation of the PDA, since absence from work is unavoidably connected with the condition of pregnancy. She maintained that, for this reason, the case should have been analyzed and decided under the rule of *Thurston*, rather than according to the *McDonnell Douglas/Burdine* approach. The court of appeals, however, held not only that terminating an employee because of her absence on leave resulting from her pregnancy was not a *per se*

violation of the PDA, but also that these facts did not constitute direct evidence of discrimination under the PDA, making *Thurston* inapplicable. Instead, the court applied the *McDonnell Douglas/Burdine* analysis and concluded that Ms. Rhett's absence, even though caused by pregnancy, constituted a "legitimate, nondiscriminatory" reason for the termination.

The court below thereby made the same error as the district court originally did in *Thurston*: applying the *McDonnell Douglas/Burdine* approach, which is "designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence,'" to a case in which there *is* direct evidence of discrimination, *Thurston*, 469 U.S. at 121. In *Thurston* this Court recognized that a rule or practice is "discriminatory on its face" if an employment decision -- there the availability of transfer to flight engineer status -- "depends upon" a protected status or characteristic -- there, the employee's age. *Id.* Here, it is equally undeniable that when Carnegie selected Deborah Rhett for termination because of her absence from the workplace *even though that absence resulted from her pregnancy*, it made the termination decision "depend upon" pregnancy. Hence, as in *Thurston*, there is "direct evidence" of discrimination that the courts below did not credit.

The issue of what constitutes direct evidence of discrimination is one of great importance. The practical consequence of applying one or the other evidentiary rules to a case is vividly illustrated by the present matter. If *Thurston* governs, then the burden of proof shifts to the employer to demonstrate that it had an affirmative defense or that there was a valid reason for terminating the petitioner even if no consideration is given to her pregnancy or pregnancy leave. 469 U.S. at 121-25. If the *McDonnell Douglas/Burdine* paradigm governs, the burden

that the reason proffered was pretextual and that the real reason for the termination decision was intentional discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Obviously, a formal, written policy that is discriminatory on its face is direct evidence of discrimination. *Thurston*, 469 U.S. at 121 (policy conditioning transfer rights on age of pilots is discriminatory on its face). Similarly, discriminatory remarks made by a supervisor or other official responsible for the employment decision at issue have been held to constitute direct evidence of discrimination, making *McDonnell Douglas/Burdine* inapplicable. *See, e.g., EEOC v. Alton Packaging Corp.*, 901 F.2d 920 (11th Cir. 1990); *Lowe v. City of Monrovia*, 775 F.2d 998, *as amended*, 784 F.2d 1407 (9th Cir. 1986). *But see Ramsey v. City & County of Denver*, 907 F.2d 1004 (10th Cir. 1990) (comments must establish an existing policy of discriminatory treatment, not personal bias of supervisor or official, in order to be direct evidence of discrimination; otherwise, proof only permits trier to draw *McDonnell Douglas* inference of discrimination), *cert. denied*, 506 U.S. 907 (1992). This case presents the issue of whether an employment decision based on conduct or a characteristic inherently linked to protected group status under anti-discrimination law, such as absence due to pregnancy, constitutes direct evidence of discrimination. This is a question that this Court has not previously addressed and that should be resolved for the guidance of the lower courts.

2. Once having incorrectly determined to analyze the record according to the principles of *McDonnell Douglas* and *Burdine*, the court of appeals compounded its error by holding that Carnegie sufficiently met its burden of production in response to petitioner's *prima facie* case

(see *supra* note 6) by articulating -- as its "legitimate, nondiscriminatory reason" for her termination -- her absence from work (while on pregnancy leave). Wholly apart from the question whether that basis for selecting which employee will be terminated was "discriminatory on its face," it is readily apparent that using absence from the jobsite as the criterion for termination would necessarily affect pregnant (or post-partum) employees more severely than employees who were not pregnant. The reason articulated by the employer, Carnegie, was thus inherently *not* "nondiscriminatory," because it had the effect of selecting the petitioner as the one to be terminated because she belonged to a protected group. *See, e.g., Griffin v. Carlin*, 755 F.2d 1516, 1526-28 (11th Cir. 1985); *Segar v. Smith*, 738 F.2d 1249, 1268-70 (D.C. Cir. 1984) (proof of intentional discrimination cannot be overcome by reliance on an employment practice that has a disparate impact upon protected group), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985).

Whether an employer may meet its burden of production by relying upon a practice neutral on its face (in the sense that it does not overtly and explicitly identify status as a member of a group protected by anti-discrimination laws as the criterion for being affected by an adverse employment action), but discriminatory in its disproportionate application to employees within protected classes, is an important issue in the enforcement of the anti-discrimination laws that is unresolved by decisions of this Court.[12]

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[12]*Compare Foster v. Dalton*, 71 F.3d 52, 55, 57 (1st Cir. 1995) (employer met production burden after plaintiff established *prima facie* case "by proffering a nondiscriminatory, if unsavory, reason for the personnel action: preselection of a friend of the appointing officer"; plaintiff did not "show that cronyism, when practiced in a particular workplace, regularly yields a racially discriminatory result")

3. Finally, as a result of the improper application of this Court's precedents as outlined above, the court of appeals reached the question whether, analyzing the record under *McDonnell Douglas/Burdine*, petitioner proved that the assertedly "legitimate, nondiscriminatory reason" was pretextual. Here again, the court of appeals' cramped reading of the two clauses of the PDA caused it to announce an evidentiary principle in conflict with the governing decisions of this Court (App. 13a-15a):

> Rhett has not made a showing that Carnegie treated her differently than it would have treated a non-pregnant employee absent on disability leave. . . . Thus, we must affirm the district court's denial of her PDA claim for the reasons indicated.
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> * * *
>
> In view of our analysis, we conclude that although the bankruptcy and district courts erred in finding that Rhett did not make out a *prima facie* case of pregnancy discrimination (because they did not apply the *Armbruster* reduction in force analytical framework), the error was harmless. Carnegie asserted a legitimate non-discriminatory reason for Rhett's termination, that she was away on leave. Rhett has not satisfied her burden of showing that this reason was pretextual. Therefore, we will affirm insofar as this case involves the termination of Rhett's position.

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with Hogan v. Pierce, 31 Fair Empl. Prac. Cas. (BNA) 115, 126-27 (D.D.C. 1983) ("when the federal government is involved, deviation from legally mandated civil service procedures and requirements cannot form the basis of a legitimate, lawful explanation sufficient to overcome a *prima facie* case of discrimination"; alternatively, while "the reasons given for the non-selection of [plaintiff] may have met the *Burdine* standards of articulating a legitimate and lawful non-discriminatory reason[], the Court holds that they were pretexts for discrimination").

This Court has consistently held that the trier of fact should consider any evidence introduced by a petitioner to demonstrate pretext, rather than looking for some talismanic showing of a particular kind. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993) ("*McDonnell Douglas* methodology was '"never intended to be rigid, mechanized, or ritualistic"'"); *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989) ("petitioner is not limited to presenting evidence of a certain type"); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *Furnco Construction Corp. v. Waters*, 483 U.S. 567, 577 (1978). The ruling below demonstrates that the point has still not been clearly understood. The Court should grant review in order to clarify and underscore its importance.

CONCLUSION

This Court granted certiorari in *Newport News Shipbuilding & Dry Dock Co. v. EEOC* because the case presented an "important question" involving the interpretation of the Pregnancy Discrimination Act that "had been decided differently" by the circuits. 462 U.S. at 675. The present case involves equally important questions concerning which there is conflict and confusion among the circuits. It provides the opportunity for the Court to give needed guidance to the lower federal courts in the application of an act affecting the rights of millions of employees whose absences from work are inherent characteristics of their pregnancies.

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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Opinion of the Court of Appeals

BEFORE: GREENBERG, MCKEE, AND WELLFORD,*
Circuit Judges

(Filed: October 31, 1997)

* * *

OPINION OF THE COURT

GREENBERG, Circuit Judge.

This case comes on before this court on appeal from the district court's order affirming a bankruptcy court order expunging the claim of the appellant Deborah Rhett, a black female, which arose out of the termination of her employment when her employer, appellee Carnegie Center Associates (Carnegie), abolished her position. The bankruptcy court had subject matter jurisdiction under 28 U.S.C. § 157(b)(2)(B), (O) and 28 U.S.C. § 1334(b). The district court had appellate jurisdiction over the bankruptcy court's order pursuant to 28 U.S.C. § 158. We have jurisdiction under 28 U.S.C. § 1291, 28 U.S.C. § 158(d), and 42 U.S.C. § 2000e-5(j).

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*Honorable Harry W. Wellford, Senior Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

A. FACTUAL AND PROCEDURAL HISTORY

The facts in the case were developed at the trial of the adversary proceeding in the bankruptcy court. Rhett began working for Carnegie, a real estate company Allan Landis owned and controlled, as a temporary secretary in April 1989. She became a full-time permanent secretary in Carnegie's Accounting/Finance Department on July 17, 1989, and received a salary increase of $1,500 in January 1990 based on her satisfactory performance.

In June 1990, Rhett informed her supervisors and co-workers that she was pregnant. When she told Keith Gormisky, the controller, and Gary Turndorf, the chief financial officer and counsel, of her pregnancy both asked if she was going to get married. Turndorf commented that being a single parent was difficult, and Rhett claimed that Gormisky said that getting married was: "in society's eyes . . . the right thing to do." Nevertheless, Turndorf testified that the fact that Rhett was unmarried played no role in Carnegie's later decision to abolish her position. Rhett also claimed that Gormisky became irate with her just before she left on maternity leave and stated that she was on "thin ice." The bankruptcy court, apparently attributing this comment to Turndorf, found it related to his view of the quality of Rhett's work.

Rhett circulated a memo to the managerial officers (including Landis, Turndorf and Gormisky) on December 18, 1990, stating that she planned to be on

maternity leave from December 21, 1990, until about April 15, 1991. Carnegie hired a temporary secretary to fill in while she was gone. Carnegie did not have a formal maternity leave policy, but Turndorf testified that its practice was to "try and hold it open for them if we could" so that "[w]hen they wanted to come back, if they contacted us and there was something open that was suitable, we would offer it to them." See bankruptcy court opinion at 5-6 (discussing two employees who left on maternity leave and subsequently returned to the same or similar positions).

Carnegie had experienced financial difficulties prior to Rhett's departure that worsened while she was gone, forcing it to make staff cutbacks to decrease costs. Consequently, just before Rhett originally had planned to return, Carnegie eliminated several positions, including Rhett's secretarial position, and terminated several employees, including her supervisor, Geoff Hammond. On March 26, 1991, Gormisky wrote Rhett to tell her that her position had been eliminated.[1] Turndorf testified that Carnegie did not make a performance-based evaluation as to which secretary's employment it should terminate because it did not consider Rhett an employee at that time and it was easy

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[1]March 26, 1991, is the date Carnegie listed with the EEOC as Rhett's "Date of Termination." In addition, Rhett's medical coverage continued with Carnegie until this date, as two weeks later she received COBRA information. The bankruptcy and district courts, however, found that Carnegie did not consider Rhett an employee at the time it abolished her position.

to abolish her former position by not hiring any more temps, thus reducing the number of secretaries from four to three. At that time Rhett was still away from work because she was under medical care (counseling) for post-partum depression, which she continued until June of 1991. When Rhett called Gormisky after receiving the letter, he reiterated that her position had been abolished. She asked about two other positions with Carnegie and was told they were not available to her. In fact, Carnegie did not interview Rhett, or consider hiring her, for any other position.

Rhett filed a suit in the district court under Title VII and the New Jersey Law Against Discrimination against Carnegie on November 26, 1993, alleging discrimination on the basis of her race, gender, and marital status.[2] The district court action was automatically stayed because Carnegie was undergoing bankruptcy reorganization. Thus, Rhett pursued the matter by filing a proof of claim with the bankruptcy court on February 19, 1994. Thereafter the district court terminated the district court action without prejudice and the case continued as an adversary proceeding in the bankruptcy court. The bankruptcy court found in Carnegie's favor after a three-day bench trial. It held that Carnegie had to reduce costs because of financial difficulties and that it eliminated staff at both the management and support levels. The court held that Carnegie abolished Rhett's position for the legitimate

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[2]She also made a claim under 42 U.S.C. § 1981 but she has not advanced that claim in these proceedings so we do not discuss it.

non-discriminatory reason that she was away from work, and not because of discrimination on the basis of race, gender or pregnancy. The court further held that she was not qualified for any of the other positions for which she asserted Carnegie should have interviewed her. The district court affirmed in an opinion and order entered August 6, 1996, holding that the bankruptcy court's factual findings were not clearly erroneous and these findings "compelled the conclusion that the secretarial position held by appellant was abolished for legitimate, non-discriminatory reasons." Rhett then appealed to this court.

The main issue on this appeal is whether an employee's absence on maternity leave can be a legitimate non-discriminatory reason for her termination. Inasmuch as the district court sat as an appellate court, we exercise plenary review of its decision. *Universal Minerals, Inc. V. C. A. Hughes & Co.*, 669 F.2d 98, 101-102 (3d Cir. 1981). Findings of fact by the bankruptcy judge, however, are only reversible if clearly erroneous. Bankruptcy Rule 8013.

B. PREGNANCY, RACIAL AND GENDER DISCRIMINATION

On this appeal Rhett claims that Carnegie terminated her employment because of her pregnancy and on account of her race and gender in violation of Title VII and the New Jersey Law Against Discrimination. We confine our discussion to Title VII because her state law claims are analyzed in the same way as her Title VII claims. *See Marzano v. Computer Science Corp.*, 91 F.3d 495, 502 (3d Cir. 1996). Indeed,

Rhett apparently recognizes this point because she does not cite a single New Jersey state court opinion in either of her briefs on this appeal.

Title VII prohibits employment discrimination based on an individual employee's sex. 42 U.S.C. §2000e-2(a). The Pregnancy Discrimination Act ("PDA"), a 1978 amendment to Title VII, states:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work. . . .

42 U.S.C. §2000e(k). There is employment discrimination whenever an employee's pregnancy is a motivating factor for the employer's adverse employment decision. 42 U.S.C. §2000e-2(m).

The bankruptcy and district courts analyzed Rhett's claim as being based on circumstantial evidence implicating the burden shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). In a Title VII case such as this one involving a reduction in force, in order to make out a *prima facie* case the plaintiff must show that (1) she belonged to a protected class, (2) she was qualified for the position from which she was terminated, (3) she was terminated and (4) persons outside of the protected class were retained. *See Armbruster v. Unisys Corp.*, 32 F.3d 768,

777 (3d Cir. 1994). While neither court made specific reference to the applicability of the modified *McDonnell Douglas* framework in reduction in force situations, the record clearly establishes that Carnegie did reduce its force, so we will apply the appropriate framework. Once the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate a legitimate non-discriminatory reason for the plaintiff's termination. *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093 (1981). If the defendant articulates such a reason, the plaintiff then must prove that the facially legitimate reason was a pretext for a discriminatory motive. *Id.*[3]

The bankruptcy and district courts held that Rhett did not establish a *prima facie* case. We disagree with this conclusion but are satisfied that the courts' error is harmless because the bankruptcy court considered the issues relevant to a reduction in force analysis at a trial and made the requisite findings for such an analysis.

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[3]Rhett argues that this case involves a *per se* violation of the PDA, so that she has presented direct evidence of discrimination. Accordingly, in her view we should analyze the case under *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613 (1985), rather than under *McDonnell Douglas*. We reject this argument because, as we discuss below, consideration of an employee's absence on maternity leave is not a *per se* violation of the PDA. Furthermore, the bankruptcy and district courts did consider Rhett's claim of direct evidence of discrimination and properly rejected it. Thus, this is a *McDonnell Douglas case.*

Thus, insofar as this case involves a reduction in force, we focus on Carnegie's reason for terminating Rhett's employment.

This case largely boils down to a dispute over one issue: whether terminating an employee because she is absent on maternity leave is a violation of the PDA. The bankruptcy and district courts found that Carnegie eliminated Rhett's position because she was not at her place of employment at that time, not because of her pregnancy. Carnegie argues, and the bankruptcy and district courts found at least implicitly, that Rhett was not employed by Carnegie at the time Carnegie eliminated her position. Rhett asserts that she was an employee on unpaid leave at that time. Carnegie had no formal maternity leave policy, but it did have a practice of allowing employees to return from leave to the same or similar position if one was available. It is undisputed that Carnegie maintained Rhett's medical insurance until it eliminated her position on March 26, 1991. Therefore, it appears that Rhett was an employee of Carnegie on an unpaid leave of absence who sought reinstatement. We need not, however, definitely so determine because even assuming that Carnegie still employed Rhett when it abolished her position, under the *Armbruster* reduction in force framework, she is not entitled to relief.

Regulations promulgated under Title VII provide:

> Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical

> conditions . . . . Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave . . . [and] reinstatement . . . shall be applied to disability due to pregnancy . . . on the same terms and conditions as they are applied to other disabilities.

29 C.F.R. §1604.10(b). The interpretive question and answer section accompanying the regulation specifies that an employer must hold open the job of a woman absent because of pregnancy "on the same basis as jobs are held open for employees on sick or disability leave for other reasons." 29 C.F.R. Pt. 1604 App. Question 9. On the other hand, the PDA does not require that employers treat pregnant employees better than other temporarily disabled employees. *Troupe v. May Dep't Stores Co.,* 20 F.3d 734, 738 (7th Cir. 1994); *Maganuco v. Leyden Community High Sch. Dist.* 212, 939 F.2d 440, 444 (7th Cir. 1991); H. Rep. No. 95-948 at 4-5 (1978), *reprinted*, 1978 U.S.C.C.A.N. 4749, 4752-53 (basic principles of the PDA); *see also California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 289 & n.29, 107 S.Ct. 683, 694 & n.29 (1987) (holding that the PDA neither requires nor prohibits states from mandating maternity leave and reinstatement policies).

Rhett argues that Carnegie terminated her employment solely because of her absence and her absence was due solely to her pregnancy and related medical conditions. Consequently, in her view Carnegie terminated her employment because of her pregnancy. The Supreme Court has held that under the Age Discrimination in Employment Act an employer must ignore an employee's age in certain employment

decisions, but not any other characteristics such as pension expense. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612, 113 S.Ct. 1701, 1707 (1993). The Court of Appeals for the Seventh Circuit has held, by analogy to *Hazen,* that the PDA "requires the employer to ignore an employee's pregnancy, but ... not her absence from work, unless the employer overlooks the comparable absences of non-pregnant employees . . . ." *Troupe,* 20 F.3d at 738. This holding is entirely consistent with the plain language of the PDA and the regulations we discuss above. This view eliminates Rhett's theory of transitivity, that if A (termination) is caused by B (absence) which is caused by C (pregnancy), then C causes A. Other courts similarly have held that "the PDA does not force employers to pretend that absent employees are present whenever their absences are caused by pregnancy." *Cmokrak v. Evangelical Health Sys. Corp.,* 819 F. Supp. 737, 743 (N.D. Ill. 1993).

We recognize that *Smith v. F.W. Morse & Co.*, 76 F.3d 413 (1st Cir. 1996), includes language contrary to that of *Troupe* for in *Smith* the court said that "an employer must put an employee's pregnancy (*including her departure on maternity leave)* to one side in making its employment decisions." *Id.* at 424 (emphasis added). In *Smith*, the pregnant employee was assured before she went on maternity leave that her position was secure, but the employer then eliminated her position during a reorganization while she was away. *Id.* at 418-19. The court's holding, however, was that the elimination of the position was not an act of pregnancy discrimination merely because the employer discovered that the position was superfluous while the employee

was on maternity leave; thus there was no causal nexus between her termination and her pregnancy. *Id.* at 424-25.

Notwithstanding the passage in Smith which we have quoted, Carnegie argues that *Smith* applies here because in its view *Smith* demonstrates that its action in terminating Rhett's employment was justified as it, like the employer in *Smith*, had a legitimate non-pregnancy based reason to discharge the pregnant employee. *Smith* may be distinguished, however, because Carnegie eliminated Rhett's position, rather than that of one of the other secretaries, because she was away on maternity leave. While it was apparent that one of the secretary positions was not needed, it was only Rhett's absence which led to her termination. Carnegie has made no showing that Rhett's position would have been eliminated if she had not been away at the time. Indeed, Carnegie made no comparative evaluation of the secretaries' performance. In *Smith*, the particular position of the pregnant employee was shown to be superfluous while she was away. *Smith*, unlike this case, did not involve a choice by the employer as to which of several similar positions to eliminate.

This case is unusual in that Carnegie terminated an employee who had performed satisfactorily solely because of an economically justified reduction in force while she was away on maternity leave. *See Geier v. Medtrõnic, Inc.*, 99 F.3d 238, 243 (7th Cir. 1996) (fired pregnant employee not qualified because she could not meet required performance quotas); *Troupe*, 20 F.3d at 735 (pregnant employee fired for chronic tardiness

prior to maternity leave); *Soreo-Yasher v. First Office Management*, 926 F. Supp. 646, 649 (N.D. Ohio 1996) (employee replaced while on maternity leave because of business need and company had written policy of not guaranteeing reinstatement after any leave of absence); *Morrissey v. Symbol Techs., Inc.*, 910 F. Supp. 117, 121 (E.D.N.Y. 1996) (fired employee's maternity leave extended beyond time for which employer's policy guaranteed reinstatement); *Rudolph v. Hechinger Co.*, 884 F. Supp. 184, 186, 188 (D. Md. 1995)(employee terminated while on maternity leave because of reasons independent of her absence); *Ulloa v. American Express Travel Related Servs. Co.*, 822 F. Supp 1566, 1570-71 (S.D. Fla. 1993) (employee terminated in reduction in force while on maternity leave because her leave extended beyond time for which reinstatement guaranteed); *Cmokrak*, 819 F. Supp. at 743 (employer justification for demoting employee while on maternity leave could be pretext); *Felts v. Radio Distrib. Co.*, 637 F. Supp. 229, 233 (N.D. Ill. 1985) (employer justification of termination because of financial difficulties was a pretext). Furthermore, in this case Carnegie had need after Rhett was gone for an employee to do the type of work she did before it eliminated her position.

Nevertheless, the law covering this case is clear for the view of the Court of Appeals of the Seventh Circuit which it set forth in *Troupe*, that an employer legitimately can consider an employee's absence on maternity leave in making an adverse employment decision, is consistent with and, indeed, is compelled by the plain language of the PDA. Thus, *Troupe* properly

requires the plaintiff employee seeking to recover under the PDA to show that the employer treated her differently than non-pregnant employees on disability leave. *See* 29 C.F.R. § 1604.10. While we do not ignore the contrary suggestion in *Smith*, we do not find it controlling because it is inconsistent with the language of the PDA. Thus, we cannot find, as Rhett urges, that the mere consideration of an employee's absence on maternity leave is a *per se* violation of the PDA. In short, the PDA does not require an employer to reinstate an employee merely because she has been absent on maternity leave. Rather, the PDA is a shield against discrimination, not a sword in the hands of a pregnant employee.

Rhett has not made a showing that Carnegie treated her differently than it would have treated a non-pregnant employee absent on disability leave. Of course, it was difficult for her to make such a showing because Carnegie never has had an employee on disability leave for a protracted period for a reason other than pregnancy. Thus, we must affirm the district court's denial of her PDA claim for the reasons indicated. *See Ulloa v. American Express Travel Related Servs. Co.*, 822 F. Supp. at 1571 (Employer is entitled to judgment when employee "has failed to show by a preponderance of the evidence that she received disparate treatment when compared to non-pregnant employees.").

The PDA does not require an employer to grant maternity leave or to reinstate an employee after a maternity leave. The PDA merely requires that an employer treat a pregnant woman in the same fashion

as any other temporarily disabled employee. In this regard, we point out that it is not unlawful under the Americans with Disabilities Act for an employer when reducing its force to discharge an employee away from work by reason of a temporary disability. *See Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1354 (9th Cir. 1996); *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996). We acknowledge that arguably it was unfair for Carnegie to fire Rhett because she was on leave rather than to decide which secretary's position to abolish on the basis of seniority or merit, but it was not illegal for it to do so unless it would not have eliminated the position of another employee on disability leave who was not pregnant. The PDA does not require fairness. *See Ulloa v. American Express Travel Related Servs. Co.*, 822 F. Supp. at 1571.

Judge McKee in his dissent seems to believe that we are equating "pregnancy with a temporary disability under the ADA." Dissent at 25. Of course, we are doing no such thing. Rather, we are holding that it is not unlawful under the PDA to terminate an employee absent by reason of pregnancy if the employer would have terminated an employee absent by reason of a different temporary disability. Thus, notwithstanding the intricate reasoning of the dissent, this case at bottom is quite straightforward and uncomplicated.

In view of our analysis, we conclude that although the bankruptcy and district courts erred in finding that Rhett did not make out a *prima facie* case of pregnancy discrimination (because they did not apply the

Armbruster reduction in force analytical framework), the error was harmless. Carnegie asserted a legitimate non-discriminatory reason for Rhett's termination, that she was away on leave. Rhett has not satisfied her burden of showing that this reason was pretextual. Therefore, we will affirm insofar as this case involves the termination of Rhett's position. Of course, our analysis requires that we affirm the district court in its rejection of her race and gender claims as well, based on the elimination of her position.[4]

In reaching our result, we have not overlooked Rhett's argument that this case is somehow different than a case based on a claim of discrimination predicated either on race or gender, because she bases her claim on both race and gender. This argument adds

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[4]We are aware that Rhett alleged certain comments by her superiors which could lead to an inference of discrimination against her, but in holding that there is no evidence of racial or gender discrimination, the bankruptcy court implicitly found that Rhett's testimony that Turndorf and Gormisky were abusive toward her regarding her status as an unwed mother was not credible, or that the explanation and denials by Turndorf and Gormisky were more credible. We cannot hold this factual finding clearly erroneous. Thus, there was no error in not inferring discrimination on the basis of these remarks. In any event, Carnegie articulated a legitimate non-discriminatory reason for terminating Rhett and the bankruptcy court, in an unassailable finding, accepted that reason.

nothing to her case because regardless of the basis for her claim of discrimination, she cannot establish that the legitimate reason that Carnegie proffered for terminating her was pretextual. Furthermore, we have not ignored Rhett's argument that Carnegie's termination of her position had a discriminatory impact of her based on her race. Rather, we reject this contention as entirely insubstantial for an employee is not insulated from having her position lawfully terminated merely because she happens to be a minority.

Rhett also argues that Carnegie should have considered her for alternate positions. She says that the positions of property management administrative assistant, secretary to Landis and receptionist became open while she was on maternity leave and she was qualified for all of them. It is not disputed that she was not considered for any of these positions. But the bankruptcy court found as a fact, and the district court affirmed, that Rhett was not qualified for the property management position or the position of assistant or secretary to Landis. The bankruptcy court also found that Rhett never indicated that she would take a lower paying or temporary job. Rhett argues that these factual findings are clearly erroneous.

Rhett has offered no more than her own opinion that she was qualified for the property manager position. Gormisky testified that the position required more than basic secretarial skills and he did not believe that Rhett adequately could perform in the job. Turndorf also testified that he would not have hired her for that position because he did not feel she would

perform well. This is more than enough support for the bankruptcy court's finding that Rhett was not qualified. Similarly, Rhett asserts that she was qualified to be Landis's personal secretary because of her extensive secretarial experience. The bankruptcy court's finding that Rhett was not qualified for this job is supported by Turndorf's testimony that the job required a special attitude and ability to anticipate Landis's needs which Rhett did not have. Inasmuch as the bankruptcy court was not clearly erroneous in finding Rhett not qualified for these positions, she has not made out a *prima facie* case of discrimination because of Carnegie's failure to hire or interview her.

On the other hand, it is clear that Rhett was qualified for the position of receptionist. But the bankruptcy court held that she never expressed an interest in this job, which paid less than her prior position. Since this is a failure to hire situation, rather than a discharge situation, under *McDonnell Douglas* Rhett must show that she applied for the position. It is undisputed that Rhett did not apply for this position, or even express any interest in it.

Rhett argues that Carnegie had an affirmative duty to contact her (but cites no case for this proposition), and she would have expressed an interest if she had been contacted. The receptionist position was the lowest paying job in the office. It was not unreasonable for Carnegie to assume that Rhett would not accept this position, especially when she did not express any interest in it. On this point we observe that the bankruptcy court found that Rhett obtained a position with the Robert Wood Johnson Foundation and started

work there on January 29, 1992, and earned $22,500 in 1992. Thus, it is understandable why Rhett did not seek a position as a receptionist as she was capable of obtaining more financially rewarding employment. Further, Turndorf testified that it was customary for employees returning from maternity leave to contact Carnegie, rather than Carnegie contacting them when a position opened up. Given this custom, we cannot find any error in the lower courts' conclusion that Rhett failed to state a *prima facie* case of discrimination because she was not given any of these positions.

C. CONCLUSION

We hold, in agreement with the Court of Appeals for the Seventh Circuit, the plain language of the PDA, and the regulations under the PDA, that an employee alleging a PDA violation must show that her employer treated her differently than it would have treated an employee on leave for a temporary disability other than pregnancy. It is not a violation of the PDA for an employer to consider an employee's absence on maternity leave in making an adverse employment decision if it also would have considered the absence of an employee on a different type of disability leave in the same way. Inasmuch as Carnegie asserted that Rhett's absence from work, rather than her pregnancy, was the reason for her termination, and Rhett has failed to show that this assertion was pretextual, her

claim fails.[5]

In view of our conclusions, we will affirm the judgment of the district court entered August 6, 1996.

McKEE, Circuit Judge, dissenting.

I agree that Deborah Rhett's claim of racial discrimination was properly dismissed. However, I respectfully dissent because I believe that the district court erred in affirming the bankruptcy court's dismissal of Rhett's claim of sex discrimination. The bankruptcy court concluded that "the uncontradicted testimony of the debtor establishes that the debtor had to let someone in the secretarial group go and the fact that Rhett was not working for the company at the time made it logical that she be the one." *Bankr Ct. Op.* at 15 (1996). I believe that the issue is not whether the employer had a logical reason for choosing Rhett (It clearly did.), but whether doing so when her absence was due solely to her pregnancy was illegal sex discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000e-2(a). I fear that the majority's failure to hold that it did constitute sex discrimination will eviscerate the protections Congress intended when it enacted the Pregnancy Discrimination

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[5]We note, however, that there are federal and state laws which do require parental leave and reinstatement. *See* 29 U.S.C. §§2612, 2614; N.J. Stat. Ann. §34:11B-4, -7 (West Supp. 1997). These laws are not applicable in this case because Carnegie has fewer that 50 employees. 29 U.S.C. §2611 (4)(a); N.J. Stat. Ann. §34:11B-3f.

Act of 1978 ("PDA"), 42 U.S.C. §2000e(k), as an amendment to Title VII.

I. BACKGROUND OF THE PREGNANCY DISCRIMINATION ACT

Title VII makes it an unlawful employment practice for an employer

> to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex

§2000e-2(a)(1). Congress created the Equal Employment Opportunity Commission ("EEOC") to implement Title VII and the EEOC developed guidelines through which employers and employees could better understand the protections afforded under Title VII. Those guidelines "implemented the Title VII prohibition of sex discrimination", H.R. Rep. No. 95-948, at 2 (1978), *reprinted* in 1978 U.S.C.C.A.N. 4749, 4752, and they expressly extend the protection of Title VII to conditions caused by pregnancy.

> Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions . . . . Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or

> sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities . . . .

29 C.F.R. §1604.10(b). The guidelines also contain an interpretive question and answer section in which the following exchange is made:

> Q: Must an employer hold open the job of an employee who is absent on leave because she is temporarily disabled by pregnancy-related conditions?
>
> A: Unless the employee on leave has informed the employer that she does not intend to return to work, her job must be held open for her return on the same basis as jobs are held open for employees on sick or disability leave for other reasons.

29 C.F.R. pt. 1604, app. Question 9. The majority concludes that this means that Carnegie Center Associates ("Carnegie") can terminate Rhett for her absence, even though it is caused by pregnancy, so long as Carnegie would have terminated an absent employee who was not pregnant. *See* Maj. Op. at 7-8.

However, the circumstances leading to Title VII's current proscriptions against sex discrimination undermine the majority's analysis. Title VII, as originally enacted, did not explicitly define sex discrimination to include disparate treatment based upon, or related to, pregnancy. As a result, some

courts adopted a narrow view of the extent to which Title VII's proscription against sexual discrimination included disparate treatment based upon pregnancy and related conditions. In *General Electric v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), the Supreme Court held that an insurance plan that excluded coverage for pregnancy-related disabilities did not constitute illegal gender-based discrimination. There, an employer's disability plan provided coverage for nonoccupational sickness and accidents, but excluded coverage for pregnancy and pregnancy-related disabilities. The plan did, though, include coverage for nonoccupational disabilities and medical procedures common to men, e.g. prostatectomies, vasectomies and circumcisions. *Gilbert,* 429 U.S. at 145-46. A group of employees sued under Title VII, alleging that the insurance plan was illegal sexual discrimination because it excluded a class of disabilities unique to women. The district court held that the plan did constitute illegal sex discrimination in violation of Title VII and the Court of Appeals for the Fourth Circuit affirmed. However, prior to the decision of the court of appeals, but subsequent to the decision of the district court, the Supreme Court decided *Geduldig v. Aiello*, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974).

In *Geduldig,* the Supreme Court upheld the validity of a nearly identical insurance policy against an attack under the Equal Protection Clause of the Fourteenth Amendment. The Court in *Geduldig* reasoned that the challenged policy was simply a business decision as to which risks an employer would insure. "The program divides potential recipients into two groups pregnant women and nonpregnant persons. While the first group

is exclusively female, the second includes members of both sexes." *Geduldig,* 417 U.S. at 496-97 n. 20 The Court in *Gilbert* upheld the challenged disability plan based upon its earlier holding in *Geduldig.* The Court reasoned that, even though *Geduldig* was based upon an equal protection argument, and *Gilbert* was brought under Title VII, the logic of *Geduldig* still applied. Accordingly, the Court held that since there was no risk from which women were protected and men were not and no risk from which men were protected that women were not, the exclusion of pregnancy-related disabilities did not invalidate the *Gilbert* policy under Title VII. The majority minimized the relevance of the EEOC guidelines when considering what Congress intended under Title VII.

Justice Brennan dissented, arguing that the Court's analysis was "simplistic and misleading" because the plan included procedures that were specific to men while excluding pregnancy-related procedures that were unique to women. 429 U.S. at 252 (Brennan, J., dissenting). He noted that "pregnancy affords the only disability, sex-specific, or otherwise, that is excluded from coverage." *Id.* Accordingly, he did not think that the classification could be saved from a finding of illegal discrimination under Title VII merely because it was a "facially neutral classification." *Id.* at 154. He concluded that the Court erred in accepting the employer's explanation that the plan merely excluded certain risks from coverage in a nondiscriminatory way. "[T]he demonstration of purposeful discrimination is not the only ground for recovery under Title VII. . . . [A] prima facie violation of Title VII . . . also is

established by demonstrating that a facially neutral classification has the effect of discriminating against members of a defined class." *Id.* at 153-54.

According to Justice Brennan, "the determinative question must be whether the social policies and aims to be furthered by Title VII and filtered through the phrase 'to discriminate' contained in §703(a)(1) fairly forbid an ultimate pattern of coverage that insures all risks except a commonplace one that is applicable to women but not to men." *Id.* at 154. He noted that the Court had previously recognized that "*discrimination is a social phenomenon encased in a social context and therefore, unavoidably takes its meaning from the desired end products of the relevant legislative enactment,* end products that may demand due consideration to the uniqueness of 'disadvantaged' individuals." *Id.* at 159, (discussing *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974) (emphasis added). Justice Brennan concluded that the EEOC guidelines were "reasonable responses to the uniform testimony of governmental investigations which show that pregnancy exclusions built into disability programs both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labor force." *Id.* at 158. Justice Brennan believed that the EEOC guidelines, "[i]n dictating pregnancy coverage under Title VII," had "merely settled upon a solution now accepted by every other Western industrial country." *Id.* (citing Dept. of Health, Education, and Welfare, *Social Security Programs Throughout the World,*

(Research Project No. 40) pp. ix, xviii, xix (1971).[1] Congress reacted to *Gilbert* by enacting the Pregnancy Discrimination Act. *See Newport News Shipbuilding and Dry Dock Co. v. EEOC,* 462 U.S. 669, 678, 103 S.Ct. 2622, 2628, 77 L.Ed.2d 89 (1983). That act amended the "Definitions" section of Title VII in part as follows:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . .

42 U.S.C. §2000e(k).

> When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision . . . . The House Report stated, 'It is the Committee's view that the dissenting Justices correctly interpreted the Act.' Similarly, the Senate Report quoted passages from the two dissenting opinions, stating that they 'correctly express both the principle and the meaning of Title VII.'

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[1]Justice Stevens also dissented, but his analysis was based upon the policies in question treating the risk of absenteeism caused by pregnancy differently than any other kind of absence. *Id.* at 161.

Newport News, 462 U.S. at 678. (citing H.R. Rep. No. 95-948 and S. Rep. No. 95-331, at 2-3 (1977).

II. INTERPLAY OF THE PDA AND THE AMERICANS WITH DISABILITIES ACT ("ADA")

The majority sums up its position as follows: "[t]he PDA merely requires that an employer treat a pregnant woman the same as any other temporarily disabled employee. In this regard we point out that it is not unlawful under the Americans with Disabilities Act for an employer when reducing its force to discharge an employee away from work by reason of a temporary disability." Maj. Op. at 11. Thus, the majority equates pregnancy-related disability with temporary disabilities under the ADA, and that analogy drives the majority's analysis.

I do not think that Rhett's claim can be decided by simply stating that the PDA requires her to be treated the same as any other employee and reasoning that her position can be terminated because an absent nonpregnant employee could have his or her position terminated under the facts of this case. Although the case law and EEOC guidelines refer to Title VII's requirement that pregnant employees be treated the same as other employees, those cases usually involve determining whether employee benefits or insurance policies discriminate by excluding pregnant employees or affording them less protection than afforded nonpregnant employees. That was the issue in *Gilbert and Newport News.* For example, in *Gilbert,* Justice Brennan stated in his dissent: "A realistic understanding

of conditions found in today's labor environment warrants taking pregnancy into account in fashioning disability policies . . . Contemporary disability programs are not creatures of a social or cultural vacuum devoid of stereotypes and signals concerning the pregnant woman employee." 429 U.S. at 160. The Court struck down the challenged health insurance policies in *Newport News* because they were the "mirror image of the plan at issue in *Gilbert.*" *Newport News, 462 U.S. at 685. See also Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris,* 463 U.S. 1073, 1074, 103 S.Ct. 3492, 3494, 77 L.Ed.2d 1236 (1983) (An employer who offers "its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which pay a woman lower monthly retirement benefits than a man who has made the same contributions," violates Title VII.).

Thus, in the health insurance and employee benefits context it is now clear that pregnancy-related conditions must be treated the same as conditions that are not pregnancy-related. However, a simple example demonstrates the danger of carrying that basic premise too far beyond the insurance or benefits context.

Historically, employers have been reluctant to hire women or have afforded women different conditions of employment because of a generalized belief that a female employee would likely leave her job to raise a family. Accordingly, there was a reluctance to devote resources to train or to teach them a job related skill.

I doubt that an employer is precluded from refusing

to hire a male employee because of a reasonable belief that the potential employee will leave shortly after he is hired. However, I think few would argue that the same employer could refuse to hire a female job applicant out of a concern that she would soon become pregnant and leave her job to raise a family. Similarly, absent a contract provision to the contrary, an employer could terminate a male employee who missed two weeks of work during his first year on the job in violation of a policy prohibiting more than one week of sick leave during the employee's first year on the job.[2] However, I think it clear that the PDA would prohibit that same employer from terminating a female employee who missed the same two weeks because of pregnancy or a pregnancy-related condition. Those two employees can not be treated the same because Congress has already differentiated their situations by enacting the PDA. One can not avoid a claim of discrimination by treating persons who are not similarly situated the same. Yet, this is what the majority's analysis does. The majority's reasoning would allow an employer to terminate a female employee because she missed a crucial meeting with an important client if a male employee would be terminated, even if the female missed the meeting because she was in labor delivering a baby, or suffering from a pregnancy-related condition. Although it may not be fair to terminate the male, it

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[2]As I discuss below, if the employee's condition was "temporary" he would not be covered by the Americans with Disabilities Act and could be terminated absent a contract that prevented such an action on the part of the employer.

would not be illegal. It is illegal to terminate the female because of the PDA. *CF. California Savings and Loan v. Guerra,* 479 U.S. 272, 292 n.42, 107 S.Ct. 683, 695, 93 L.Ed.2d 613 (1987) ("[W]e conclude that in enacting the PDA Congress did not intend to prohibit all favorable treatment of pregnancy . . . .").

The majority notes that pregnancy is a temporary condition that gives rise to a temporary disability. It argues that since the PDA bars discrimination based upon pregnancy, it merely requires that pregnant employees be treated the same as all other temporarily disabled employees, thereby limiting the comparison group for pregnant employees to nonpregnant employees who have suffered a temporary disability. The majority concludes that, despite her temporary disability due to pregnancy, Rhett can be terminated unless Carnegie would not terminate a male employee who was similarly "temporarily" disabled. *See Maj.* Op. at 11. That analysis rests upon equating a protected, but temporary, condition (pregnancy) with a temporary unprotected disability under the ADA. The ADA does not shield a non-pregnant employee from termination because temporary disabilities are excluded from the ADA. Regulations that were promulgated pursuant to the ADA define disability as:

> (1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.

29 C.F.R. § 1630.2(g). "Substantially limits" is defined

to mean:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

§ 1630.2 (j)(1). Several factors have been identified to assist in determining whether a particular "disability" is of such severity as to come within the protection intended under the ADA. These factors include:

> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

§1630.2(j)(2). "Disabilities" that are temporary do not, by definition, rise to the level of substantially limiting a major life function. *See Rogers v. International Marine Terminals Inc.,* 87 F.3d 755, 758 (5th Cir. 1996) ("[T]emporary conditions that are not chronic usually do not rise to the level of a 'disability.'") and (*Taylor v. Dover Elevator Systems, Inc.* 917 F.Supp. 455, 461 (N.D.

Miss. 1996) ("[T]emporary injuries with no permanent effects are ordinarily not considered disabilities under the ADA.") (citing *Evans v. City of Dallas,* 861 F.2d 846, 852-53 (5th Cir. 1988); *Rakestraw v. Carpenter Co.,* 898 F.Supp. 386, 390 (N.D. Miss. 1995); *Oswalt v Sara Lee Corp.,* 889 F.Supp. 253, 257 (N.D. Miss. 1995), *aff'd,* 74 F.3d 91 (5th Cir. 1996)).

However, just as temporary disabilities are excluded from the protections of the ADA by definition, temporary pregnancy-related conditions are explicitly covered by Title VII's prohibition against sex discrimination under the PDA. Accordingly, the protection afforded pregnancy-related conditions can not be equated with that afforded temporary disabilities merely because pregnancy is temporary. To do so under the facts of this case is contrary to the mandate of the statute, effectively amends the PDA and forces Rhett to rely upon the ADA which provides no protection for pregnancy related conditions because of their temporary nature.

The majority relies on *Rogers and Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1354 (9th Cir. 1996), *cert. denied,* 117 S.Ct. 1247, 137 L.Ed.2d 329 (1997), to substantiate its claim that the temporarily disabled employee resides outside of statutory protection—regardless of whether the temporary disability is due to pregnancy. *See* Maj. Op. at 11. In *Rogers*, an employee ("Rogers") sued under the ADA when he was laid off pursuant to a reduction in force ("RIF"). Rogers had been absent because of health problems related to an ankle surgery. The court held

that Rogers was not protected by the ADA because he was not "disabled" within the meaning of the statute. "In sum, Rogers' ankle afflictions were temporary and did not constitute a permanent disability . . . . The EEOC regulations concur, that 'temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities.'" 87 F.3d at 759 (quoting 29 C.F.R. § 1630.2(j) (Appendix)). However, the fact that they are not "disabilities" under the ADA does not mean that they are not protected under the PDA, if they are pregnancy-related.

Similarly, in *Sanders*, employee Sidney Sanders ("Sanders") was terminated while on leave for a cancer-related psychological disorder. While he was away other employees assumed his responsibilities and employer Anreson Products decided to replace Sanders rather than allow him to return at the end of his sick leave. Although Sanders suffered from cancer, he conceded that this absence was related only to his psychological disorder that was temporary. Accordingly, the court framed the issue before it as "whether Sanders' temporary psychological impairment qualifies as a disability under the ADA." *Id.* at 1353. The court held that it did not because that impairment did not "substantially limit" a major life function. *Id.*

If Congress intended to equate pregnancy with a temporary disability under the ADA, it afforded pregnant women precious little protection when it enacted the PDA. Pregnancy is by its nature temporary. Holding that it is therefore the equivalent of a "temporary disability" is hardly consistent with "the

social policies and aims to be furthered by Title VII and filtered through the phrase 'to discriminate' contained in [that Act]" *Gilbert,* 429 U.S. at 155 (Brennan, J., dissenting). Accordingly, we can only give effect to the intent behind this statute by viewing the term "temporarily disabled" as it applies to pregnancy as referring to the duration of the disability, not to the quality of it.

The majority also relies upon *Troupe v. May Dept. Stores Co.,* 20 F.3d 734, 738 (7th Cir. 1994). However, I am not persuaded by the reasoning of *Troupe* and believe that we should be guided instead by *Smith v. F.W. Morse & Co., Inc.,* 76 F.3d 413 (1st Cir. 1996).

III. *TROUPE v. MAY DEP'T STORES CO.*

In *Troupe,* pregnant employee Kimberly Hern Troupe was fired from a Lord & Taylor department store for tardiness due to pregnancy. Troupe sued her employer, May Department Stores (doing business as Lord & Taylor), alleging illegal sex discrimination under Title VII. The district court granted Lord & Taylor's motion for summary judgment and Troupe appealed. On appeal, the Court of Appeals for the Seventh Circuit affirmed, noting that "[t]he great, the undeniable fact is the plaintiff's tardiness." *Id.* at 737. The court analogized the plaintiff's plight to that of a hypothetical Black employee who is fired after a kidney transplant because the employer either wants to avoid paying the employee while on sick leave or doubts that the employee will return. The court reasoned that, in firing the Black employee, the employer may be

breaking a contract, but it would not be violating Title VII's protections against racial discrimination as long as the employer would also fire a similarly situated White employee.[3] *Id.* at 738. The failure of the *Troupe* analogy, however, is that absence from work is not endemic to a protected racial trait. Absence is, however, endemic to "pregnancy, childbirth, or related medical conditions." §2000e(k). Indeed, the historical underpinnings of Title VII suggest that it was the fear that women would get pregnant and be absent from their jobs that was, at least in part, responsible for the longstanding discrimination against women (especially younger women) in the workplace.

As noted above, employers have assumed that female employees may become pregnant and that pregnancy would make them unavailable for work. *See Gilbert,* 429 U.S. at 150 n.1 (Brennan, J., dissenting). ("General Electric's disability program was developed in

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[3]The Seventh Circuit notes that "[e]mployers can treat pregnant women as badly as they treat non-pregnant employees, even to the point of 'conditioning the availability of an employment benefit on an employee's decision to return to work after the end of the medical disability that pregnancy causes.'" *Troupe,* 20 F.3d at 738 (quoting *Maganuco v. Leyden Community High School Dist.* 212, 939 F.2d 440, 445 (7th Cir. 1991). In treating pregnant women as badly as other nonpregnant employees, an employer cannot, however, impose policies that disparately impact pregnant women because of their pregnancy. *See Maganuco,* 939 F.2d at 445.

an earlier era when women openly were presumed to play only a minor and temporary role in the labor force. As originally conceived in 1926, General Electric offered no benefit plan to its female employees because 'women did not recognize the responsibilities in life, for they were probably hoping to get married soon and leave the company.'") (quoting D. Loth, Swope, G.E.: *Story of Gerard Swope and General Electric in American Business* (1958)). Yet, here the majority finds that"[i]t is not a violation of the PDA for an employer to consider an employee's absence on maternity leave in making an adverse employment decision if it also would have considered the absence of an employee on a different type of disability leave in the same way." Maj. Op. at 14. This is a simplistic interpretation of the PDA and the EEOC guidelines. In a different Title VII context, the Supreme Court noted that interpreting the prohibitions of Title VII to only prohibit overt intentional discrimination would leave employers free to enact facially neutral policies based on factors that were a proxy for race and thereby circumvent Title VII's protection. *See Griggs v. Duke Power*, 401 U.S. 424, 430, 91 S.Ct. 849, 853, 28 L.Ed.2d (1971). The approach taken in *Troupe*, under the PDA, and adopted by the majority here, suffers from the same infirmity.

It is jurisprudential sleight of hand to suggest that the PDA does not require that pregnant women be treated better than their male counterpart. That is a misleading statement of the issue. Thus, the court in *Troupe* misses the analytical mark when it states that "[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees," 20 F3d at 738, unless it defines "similarly affected"

employees as other employees having a protected trait that is endemic to the behavior at issue. However, *Troupe* fails to do so and assumes that the pregnant employee is the "equal" of her nonpregnant coworker. Similarly, the majority erroneously concludes that "the PDA does not require that employers treat pregnant employees better than other temporarily disabled employees." *See* Maj. Op. at 8.

Relying upon *Hazen Paper Company v. Biggins,* 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), the majority states that "[t]he Supreme Court has held that under the Age Discrimination in Employment Act an employer must ignore an employee's age in certain employment decisions, but not any other characteristics such as pension expense." Maj. Op. at 8. However, I believe the *Hazen Paper* requires that we reject *Troupe.* In *Hazen Paper,* a 62 year old employee sued his employer, alleging that he had been terminated based upon age discrimination, in violation of the Age Discrimination in Employment Act ("ADEA"), 26 U.S.C. §626, and the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. §1140. A jury found for the employee on both claims, and the employee appealed. The Court of Appeals for the First Circuit affirmed, relying heavily on evidence that the plaintiff had been fired in order to prevent his pension from vesting. The court determined that the jury could have concluded that "age was inextricably intertwined with the decision to fire [the plaintiff]. If it were not for [his] age . . . his pension rights would not have been within a hairbreadth of vesting," 953 F.2d 1405, 1412 (1st Cir. 1992), and he would not have been fired. The Supreme Court reversed as to the ADEA claim. The

court reasoned that firing an older employee to prevent pension benefits from vesting based on years of service does not amount to "willful" age discrimination under the ADEA. 507 U.S. at 608. The court stated, "[W]e now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Id.* at 609. The case before it was a disparate treatment case and the Court concluded that "a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Id.* at 611.

> Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age . . . .
>
> Thus the ADEA commands that 'employers are to evaluate [older] employees . . . on their merits and not their age.' The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.
>
> When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is . . . . Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other,

> and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'

507 U.S. at 610-611.

Pregnancy and absence are not, however, analytically distinct, and an employer can not punish for the absence occasioned by pregnancy under Title VII. As noted above, that statute states that it is an unlawful employment practice to "discharge any individual . . . or otherwise discriminate . . . because . . . of sex," 42 U.S.C. §2000e-2(a)(1), and, after the PDA, that includes discrimination "on the basis of pregnancy . . . or related medical conditions." 42 U.S.C. §2000e(k). That protection is meaningless unless it is intended to extend to the "temporary" absence from employment that is unavoidable in most pregnancies. Thus, the absence endemic to pregnancy, unlike factors that may sometimes be a proxy for age, has to be protected under the facts of this case. In *Hazen Paper*, it was the employee's years of service, not his age, that occasioned the vesting of his pension. The Court was very careful to note that

> [W]e do not consider the special case where an employee is about to vest . . . as a result of his age, rather than years of service, and the employer fires the employee in order to prevent vesting. That case is not presented here. Our holding is simply that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of years of service.

507 U.S. at 613. I believe that Rhett's situation under

the PDA is much closer to the situation of an employee whose pension is vesting because of age than to the plight of the plaintiff in *Hazen Paper*. Accordingly, the holding in *Hazen Paper* does not assist the majority nearly as much as first appears.[4]

"[I]n using the broad phrase 'women affected by pregnancy, childbirth and related medical condition,' the [PDA] makes clear that its protection extends to the *whole range of matters concerning the childbearing process.*" H.R. Rep. 95-948 (emphasis added). The holding in *Troupe*, and the majority's holding here, remove a substantial portion of the protection Congress intended. Troupe's position was terminated because of

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[4]I do not mean to suggest by this that the PDA requires an employer to necessarily take affirmative steps to make it easier for a pregnant employee to work. *See Troupe,* 20 F.3d at 738 ("The Pregnancy Discrimination Act does not . . . require employers to . . . take . . . steps to make it easier for pregnant women to work."). The PDA does not provide for accommodation as does the ADA.

Nor do I suggest that an employee who is pregnant can not be fired for reasons that are not occasioned by pregnancy. For example, if Carnegie decided in good faith, to eliminate everyone with a certain salary grade based upon its business judgment, Rhett could be terminated if she was at that salary grade whether she was on pregnancy leave or not because the termination would not be based upon a factor endemic to her pregnancy.

conditions related to pregnancy (tardiness occasioned by her morning sickness). I do not understand, therefore, why she was not terminated "because of . . . her pregnancy," §2000e(k), in violation of Title VII.

I believe that we should reject the holding in *Troupe*, and adopt instead the analysis set forth in *Smith*, 76 F.3d 413. There, a female employee ("Smith") worked for a small company that was undergoing restructuring. She informed the owner of the company that she was pregnant and would be taking maternity leave. Although the company had no maternity leave policy, Smith was assured that her job was secure and the company would simply divide her duties amongst its remaining employees in her absence. The company made this commitment even though it expected her absence to cause "the sky to fall." *Id.* at 418. The company also held regular "reality check" meetings in the hope that they could minimize the impact of the absence of such a key employee. However, to the company's great surprise the sky did not fall. In fact, "the plant functioned very well," *id.* at 419, in Smith's absence. Soon after Smith gave birth, she informed the general manager, Maryann Guimond, that she wished to return to work a week earlier than planned. At that time, Guimond made inquiries of Smith and Smith's sister (who also worked for the company) regarding Smith's plans to have children in the future. Days later, Guimond determined that Smith's position was superfluous and eliminated it. Smith's duties were then given to another employee who had been functioning as the operations manger.

Smith sued, alleging, among other things, violation

of Title VII. The Title VII claim was decided in a bench trial in the district court, and that court entered judgment for the employer as a matter of law. Smith appealed, and the Court of Appeals for the First Circuit affirmed. Smith argued that the company had violated Title VII because her absence on pregnancy leave afforded the company the opportunity to learn that it could afford to eliminate her position. The court disagreed because it concluded that the employer would have eliminated the position regardless of Smith's pregnancy, and agreed with the employer's argument that "even if Smith had not been on maternity leave she would have been flattened by the downsizing steamroller." *Id.* at 419. The Court reasoned that

> [T]here is little doubt that an employer, consistent with its business judgment, may eliminate positions during the course of a downsizing without violating Title VII even though these positions are held by members of protected groups (pregnant women included)" (citing *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 844-45 (1st Cir. 1993), *cert. denied,* 511 U.S. 1018, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994); *Goldman v. First Nat'l Bank,* 985 F.2d 1113, 1118-19 (1st Cir. 1993); *Montana v. First Fed. Sav. & Loan Ass'n,* 869 F.2d 100, 105, 107 (2d Cir. 1989); *Dister v. Continental Group, Inc.,* 859 F.2d 1108-1115 (2d Cir. 1988); *Pearlstein v. Staten Island Univ. Hosp.,* 886 F.Supp. 260, 268-69 (E.D.N.Y. 1995)) . . . . [T]he flip side of the coin, however, is that an employer who selectively cleans house cannot hide behind convenient euphemisms such as "downsizing" or "streamlining." Whether or not trimming the fat

> from a company's organizational chart is a prudent practice in a particular business environment, the employer's decision to eliminate specific positions must not be tainted by a discriminatory animus.

Id. at 422 (citing *Goldman*, 985 F.2d at 1118 n.4; *Maresco v. Evans Chemetics,* 964 F.2d 106, 111 (2d Cir. 1992); *Mesnick,* 950 F.2d at 825; *Pearlstein,* 886 F.Supp. at 268-69.). The court held that the "employer may discharge an employee while she is on a pregnancy-induced leave so long as it does so for legitimate reasons unrelated to her gravidity." *Id.* at 424. Smith's employer had selected her merely because it realized that her position was not nearly as valuable as her supervisors previously believed. The fact that her absence on maternity leave afforded the employer an opportunity to learn just how expendable her position was did not mean that she was terminated "because of her pregnancy."

However, and most significantly for purposes of our analysis, the court also stated:

> Title VII mandates that an employer must put an employee's pregnancy (*including her departure on maternity leave)* to one side in making its employment decisions — but the statute does not command that an employer bury its head in the sand and struthiously refrain from implementing business judgments simply because they effect a parturient employee.

Id. at 424 (citing *Troupe,* 20 F.3d at 738) (emphasis

added). The court added that "[a]t bottom, Title VII requires a causal nexus between the employer's state of mind and the protected trait (here, pregnancy)." *Id.* at 425. In *Smith,* the nexus did not exist because the decision to eliminate the employee's job was based upon the importance (or lack thereof) of the job. Here, however, the decision to eliminate Rhett's job was based solely upon her pregnancy related absence. That causal nexis runs afoul of Title VII's prohibition of sex discrimination.

Carnegie clearly did not put Rhett's departure on maternity leave to one side when deciding to terminate her. Rhett's absence from work was so inextricably intertwined with pregnancy, her protected trait, as to make the two inseparable. In its "theory of transitivity," the majority separates the events in this case into discrete entities that suggest the causal relationship between Rhett's pregnancy and her termination. The majority too easily rejects this position. *See* Maj. Op. at 8 ("This view eliminates Rhett's theory of transitivity, that if A (termination) is caused by B (absence) which is caused by C (pregnancy), then C causes A.").

IV. TERMINATION BECAUSE OF PREGNANCY

An employer can not insulate itself from the reach of Title VII by an action that appears neutral, yet has the functional effect of disparately treating an individual based upon a protected trait. *See Griggs,* 401 U.S. at 430. Carnegie's action is the functional equivalent of terminating Rhett because she was pregnant. *See Teahan v. Metro-North Commuter R.R.*

Co., 951 F.2d 511 (2d Cir. 1991).

In *Teahan*, an employee suffering from alcoholism brought an action against his employer alleging that his discharge for excessive absenteeism was in violation of §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, because his absences had been caused by that disease. Summary judgment was entered in favor of the employer because the district court concluded that there was no issue of material fact as to whether Teahan "was terminated 'solely by reason of' his handicap." *Id.* at 514. The district court concluded that the employer "had not relied on Teahan's handicap . . . [and had] a nondiscriminatory reason for firing him (excessive absenteeism)." *Id.* Teahan appealed.

On appeal, Teahan argued that "because the ground upon which he was terminated was his excessive absenteeism, and since his absenteeism was 'caused by' his substance abuse problem, the district court improperly shifted the burden to him to present evidence of pretext." *Id.* The Court of Appeals for the Second Circuit agreed, stating that "it does not inevitably follow that termination for conduct resulting from a handicap is not termination 'solely by reason of' that handicap."[5] *Id.* at 515. Indeed, "an employer

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[5]The "solely by reason of" inquiry, the court explained, is "designed to weed out [ ] claims where an employer can point to conduct or circumstances that are causally unrelated to the plaintiff's handicap." *Id.* at 516 (emphasis added). In the context of the PDA, the analogue is the "because of or on the basis of

'relies' on a handicap when it justifies [its employment decision] based on conduct caused by that handicap."[6] *Id.* Because the district court erred in concluding that Teahan had not established that he was fired "solely by reason of his handicap," his employer never had to satisfy its burden of "demonstrating that [Teahan's handicap] was relevant to the job qualifications." *Id.* at 515. Accordingly, the court remanded the case for further proceedings.[7] Similarly, in *Cushing v. Moore,*

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pregnancy" inquiry.

The court accepted that the plaintiff's excessive absences were "caused by" his alcoholism because its review on appeal required that it examine all facts in the light most favorable to Teahan. The court recognized, however, that "the causal connection between absenteeism and alcoholism is ordinarily a question of fact." *Teahan,* 951 F.2d at 515.

[6]Under the Rehabilitation Act, "[t]he question then becomes whether the employee is qualified despite his or her handicap to perform the essential functions of the job." *Id.* The employer bears that burden: "[A]fter complainant proves a prima facie case, the employer is required to rebut the inference that the handicap was improperly considered by first demonstrating that it was relevant to the job qualifications." *Id.*at 515.

[7]Other courts of appeals have refused to adopt Teahan's rationale. *See e.g., William v. Widnall,* 79 F.3d 1003 (10th Cir. 1996); *Maddox v. University of Tennessee,* 62 F.3d 843 (6th Cir. 1995). However, in all

970 F.2d 1103, 1108 (2nd Cir. 1992), the court stated that "the key determination becomes the factual issue of whether an employee's conduct (such as absenteeism), which forms the articulated basis for a job termination, is actually caused by a handicap (such as substance abuse)" (citing *Teahan,* 951 F.2d at 517; *Hogarth v. Thornburgh,* 833 F. Supp. 1077, 1085 (S.D.N.Y. 1993) ("[I]f a handicap manifests itself in certain behavior, and an employee is discharged because of that behavior, he has been terminated 'solely by reason of' the handicap."); and *Ambrosino v.*

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cases, the employee had exhibited either egregious or criminal conduct. *See e.g., Maddox,* 62 F.3d at 845 (assistant coach at University of Tennessee fired because of the bad publicity that the university was subjected to after he was arrested for DUI). Because of the nature of the conduct involved, these courts were unwilling to "adopt an interpretation of the [Rehabilitation Act] which would require an employer to accept egregious behavior by [a disabled employee] when that same behavior, exhibited by a nondisabled employee, would require termination." *Williams,* 79 F.3d at 1007. Thus, "[a]t first blush, it may appear that the Second Circuit is out of synchronization with the others. However, distinction lies in the categorization of the conduct. . . . [In the cases rejecting Teahan,] the conduct [at issue] is . . . *misconduct.*" *Taylor,* 917 F.Supp. at 462 (emphasis added). Rhett's case does not implicate the concerns of those courts that have rejected *Teahan.*

Metropolitan Life Insur. Co., 899 F.Supp. 438, 444 (N.D.Cal. 1995) (The court chose to follow the line of cases holding that "termination based on conduct caused by chemical dependency and status which results from the dependency and/or the conduct caused by the dependency is termination based on the disability of chemical dependency."). However, that consideration is not present here, and I believe that this matter should be remanded for a determination of whether Rhett would have been selected for termination based upon factors other than her absence. Although it is for the employer, and not a court, to determine how best to select those positions that will be eliminated in a reduction in force, Title VII requires this employer to adopt criteria that put Rhett's pregnancy-related absence aside and allow for an individualized determination driven by her own capabilities.

V. CONCLUSION

For the reasons stated above, I would reverse the decision of the district court and remand this matter to the bankruptcy court for a determination of whether Rhett would have been terminated had her pregnancy-related absence been put aside.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Opinion of the District Court

BROWN, District Judge

This matter comes before the Court on the appeal of plaintiff Deborah Rhett from the January 9, 1996 Order of the United States Bankruptcy Court for the District of New Jersey in the above-captioned matter.[1] For the reasons set forth herein, the Court will affirm the Bankruptcy Court's decision and January 9, 1996 Order in all respects.

I. BACKGROUND

In this action, appellant Deborah Rhett ("appellant" or "Rhett") claims that she was discharged from employment by appellee because of her race and gender. Rhett is an African-American female who was employed by appellee Carnegie Center Associates ("appellee" or "CCA") from April, 1989 to March 26, 1991.[2] She is a graduate of Burlington High School

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[1]The January 9, 1996 Order was based on findings of fact and conclusions of law that the Bankruptcy Court rendered in a decision filed on or around December 21, 1995.

[2]Appellant challenges only the Bankruptcy Court's ultimate factual conclusions, not the Bankruptcy Court's findings as to the underlying facts, all of which are set out in its written decision of December 21, 1995. *See* Appendix to Brief of Appellant Deborah Rhett Vol. I,

and has considerable secretarial and clerical experience. Throughout her various employment experiences, she received training in computer operations and in other areas.

CCA is owned and controlled by Alan Landis, and is operated from an office in Carnegie Center in Princeton, New Jersey. There is no dispute that Landis has final authority over all significant employment decisions. Thus, the parties agree that "[n]either Gary Turndorf [n]or Keith Gormisky [was] involved in the decision to terminate Rhett's employment; the decision was made solely by Alan Landis." *See* Appellant's Brief at 9 ¶22; Appendix to Brief of Appellant Vol. II, at 329-10 to 329-329-12 (direct testimony of Gary Turndorf).

When Rhett commenced employment with CCA in April, 1989, she worked a full-time schedule as a temporary secretary. On July 17, 1989, CCA hired Rhett as a permanent secretary in its accounting/finance department. Her duties included, *inter alia*, word processing, filing, statistical typing and answering the telephone. She worked for several CCA executives, including Geoff Hammond. Rhett alleges that when she was promoted to a full-time position, she was promised a performance review in six months and an annual raise of $1500 if her performance was satisfactory.

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at 6-14.

In January, 1990, she received a favorable review and her salary was raised by $1500, to $25,000 per year. She also received in 1990 an additional $5000 for overtime work. At no time did CCA tell Rhett that her performance was deficient.

Rhett worked with several other employees, all of whom are white. Evelyn Angulites was a secretary already employed by CCA when Rhett began work there. Barbara MacGregor was Landis's personal secretary, and had longer tenure as such than Rhett had in her job. When MacGregor took maternity leave, Rachel Drexinger replaced her from January, 1991 to June, 1991. MacGregor sought to return to CCA as Drexinger was leaving the company, and MacGregor thus regained her position. Kathy Buchanan was also a secretary for CCA, and had been employed there longer than Rhett. Kristen Wolf started with CCA when Rhett began to work full-time. In December, 1990, Wolf became a secretary for several senior officers at CCA, and later an administrative assistant. Kathleen Cohen was also Landis's personal secretary and administrative assistant. Cohen left CCA in April, 1991, and Tammi Medoff, who was not previously employed by CCA, replaced her. Linda Kraus was an accounts payable supervisor who, after maternity leave, returned as an accounts payable clerk.

In June, 1990, Rhett informed her supervisor and other management employees that she was pregnant. Specifically, she informed Keith Gormisky, the Controller of CCA and an executive who assigned her work. Rhett alleges that Gormisky responded by asking her whether she intended to get married. She further

alleges that when she answered no, he said "[i]n society's eyes that's the right thing to do. You should get married." Rhett also asserts that when she informed Gary Turndorf, Chief Financial Officer and General Counsel to CCA that she was pregnant, he also asked whether she would get married. Turndorf claims he only commented on the difficulty of being a single parent.

On or around December 18, 1990, Rhett sent a memorandum to her supervisors, including Gormisky, Turndorf, Landis, John Dempsy and Robert Mack, notifying them that she was about to take maternity leave and that she intended to return on or about April 15, 1991. Appendix to Brief of Appellant Deborah Rhett ("Appellant's Appendix") Vol. II, at 471. She took maternity leave on or around December 18th or 20th.

CCA had no formal policy regarding maternity leave. Instead, the record indicates, and the Bankruptcy Court correctly concluded, that CCA typically tried to rehire or find a position for someone seeking to return from maternity leave. That does not mean, however, that someone taking maternity leave was guaranteed a position when she was prepared to return to CCA. In appellant's case, unrebutted testimony indicates that CCA sought to keep appellant's position open by placing a temporary employee in Rhett's position until CCA abolished it in March, 1991. Testimony of Gary Turndorf, Appellant's Appendix Vol. II, at 75-23 to 76-76-1 ("I think that Ms. Rhett had expressed a desire after she had her baby, and we tried to accommodate that desire by hiring

temporaries to keep the position open for her.").

At some point while Rhett was still employed by CCA, the company began to experience severe financial difficulties. The trial testimony makes clear that by 1990, CCA was receiving many calls daily from vendors seeking satisfaction of overdue payments. CCA asserts that in an effort to contract its operations and reduce its operating expenses, it eliminated several positions, including Rhett's. On or about March 26, 1991, Gormisky sent a letter to Rhett informing her as follows:

> Before you left to have your baby, I am sure you were aware of the financial difficulties which we were experiencing at Carnegie Center and elsewhere. We have been struggling to meet our obligations, and have made a number of contractions in our staff. Unfortunately, this includes your position. I am writing to tell you this so that you can make other plans.
>
> If there is a change in our situation, I will contact you. In the meantime, if we can help you in any way, we will try to do so.

March 26, 1991 Letter from Keith Gormisky to Deborah Rhett, Appellant's Appendix Vol. II, at 472.

CCA also released several supervisory employees around this period. These included Hammond, who was released in December, 1990, Eugene Gold in March, 1991, Dave O'Connor in April, 1991, and Peter Clark in June, 1991. Additionally, CCA froze all

salaries and decreased the remaining executives' compensation.

Rhett sued CCA in this Court on or about November 26, 1993, and the action was docketed as Civ. No. 93-5251 (AET). Rhett alleges that CCA discriminated against her based on her race and gender, in violation of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e *et seq.* and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12(a) *et seq.*, by terminating her employment and denying her other employment opportunities. She claims that she was terminated, and not considered for other employment positions with CCA, because of her race and because she was on maternity leave.[3] Rhett asserted that CCA should have considered her for the following positions: (1) property management administrative assistant; (2) secretary to Landis; and (3)

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[3]The gist of Rhett's gender discrimination claim is that she was discharged, and not considered for other positions with CCA, because she was out on maternity leave when CCA began to decrease its staff. The Bankruptcy Court stated that "the uncontradicted testimony of the debtor establishes that the debtor had to let someone in the secretarial group go and the fact that Rhett was not working for the company at the time made it logical that she be the one." Appellant's Appendix Vol. I, at 15. The Bankruptcy Court did not find that termination under those circumstances presented any Title VII or NJLAD issue.

receptionist.[4] She seeks reinstatement, back pay, front pay, compensatory damages, punitive damages, attorneys fees and costs.

CCA subsequently filed a petition pursuant to Chapter 11 of the Bankruptcy Code, and Rhett's prepetition claim was automatically stayed pursuant to 11 U.S.C. § 362(a). Rhett filed her proof of claim with the Bankruptcy Court on February 19, 1994. On May 19, 1994 the District Court entered an Order administratively terminating Civ. No. 93-5251 without prejudice.

CCA moved to expunge Rhett's claim before the Bankruptcy Court, which conducted a bench trial on Rhett's claims on October 20, 1995, November 29, 1995 and November 30, 1995.[5] In a written decision filed on

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[4]The Bankruptcy Court concluded that "the testimony of the debtor, through the statements of Turndorf, make it clear that she was not qualified for any of those jobs. Each of the positions required personal qualities that Rhett had not previously demonstrated." Appellant's Appendix Vol. I, at 13.

[5]At an initial hearing on debtor's motion to expunge the claim, the Bankruptcy Court determined that it was a contested matter as defined by FED. R. BANKR. P. 9014, and that it should proceed as an adversary proceeding. The Bankruptcy Court had jurisdiction over the matter pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(b)(2)(B) & (O). Appellant's Appendix Vol. I, at 2.

or around December 21, 1995, the Bankruptcy Court found that "[t]here is not a scintilla of evidence that any person at Carnegie who had the power to hire or fire, discriminated against Rhett on the basis of her race. The evidence is to the contrary." Memorandum Opinion of Hon. William H. Gindin, Appellant's Appendix Vol. I, at 14. The Bankruptcy Court also found that "[t]here is not a scintilla of evidence that any person at Carnegie who had the power to hire or fire discriminated against Rhett on the grounds that she was a single and/or unwed mother. The evidence is to the contrary." *Id.* The Bankruptcy Court entered an Order, dated January 9, 1996, expunging Rhett's discrimination claims.

Rhett filed a timely appeal from the Bankruptcy Court's January 9, 1996 Order. Rhett argues that the Bankruptcy Court's decision must be reversed for several reasons. First, she contends that the Bankruptcy Court applied incorrect legal principles to her claims by limiting its consideration to the disparate treatment analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), instead of also considering the disparate impact analysis that she insists is the appropriate standard for discharge claims. Second, Rhett maintains that the Bankruptcy Court committed factual and legal error by failing to find that CCA violated Title VII and the New Jersey Law Against Discrimination ("NJLAD") under the direct and mixed-motive standards. Third, she contends that the Bankruptcy Court erred as a matter of law and fact in finding that she had not established a prima facie case of gender and race discrimination. Fourth, Rhett argues that the Bankruptcy Court erred as a matter of

law and fact by finding that CCA had articulated a legitimate, non-discriminatory reason to terminate Rhett. Finally, Rhett argues that the Bankruptcy Court failed to consider whether Rhett had established that CCA's proffered justification for her termination was pretextual.

II. DISCUSSION

A. STANDARD OF REVIEW

In an appeal from a bankruptcy court's decision, the district court applies two different standards of review. The district court reviews factual findings of the bankruptcy courts under a clearly erroneous standard. *See In re Sharon Steel Corp.*, 871 F.2d 1217, 1222 (3d Cir. 1989); FED. R. BANKR. P. 8013. A bankruptcy court's conclusions of law, however, are subject to *de novo* review. *See In re Sharon Steel Corp., 871* F.2d at 1222; FED. R. BANKR. P. 8013.

The matter before the Court requires us to determine whether the Bankruptcy Court correctly found no direct or circumstantial case of discrimination against appellant. This determination involves reaching a conclusion as to an ultimate fact. *See* Memorandum Opinion of Hon. William H. Gindin, Appellant's Appendix Vol. I, at 14. An ultimate fact "'is a legal concept with a factual component'. . . and 'is usually expressed in the language of a standard enunciated by case-law rule or by statute, e.g., an actor's conduct was negligent; the injury occurred in the course of employment; the rate is reasonable. . . .'" *In re Sharon Steel Corp.*, 871 F.2d 1217, 1223 (3d Cir. 1989) (quoting

Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 102 (3d Cir. 1981)).

When reviewing an ultimate finding, the Court "'must accept the trial court's findings of historical or narrative facts [as to which there is no dispute here] unless they are clearly erroneous, but [it] must exercise a plenary review of the trial court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.'" *Id.* (quoting *Universal Minerals, Inc.*, 669 F.2d at 103). *See also United States v. McCombs*, 30 F.3d 310, 317 (2d Cir. 1994) ("[W]hen the issue is the trial court's application of a legal standard to facts undisputed or reasonably found out review is not limited by the clearly erroneous standard and we will not shy away from plenary review . . . .") (quoting *In re Hygrade Envelope Corp.*, 366 F.2d 584, 588 (2d Cir. 1966)); *De La Cruz v. Cohen*, 191 B.R. 599, 604 (D.N.J. 1996) (same).

B. OVERVIEW OF TITLE VII AND NJLAD

Title VII of the Civil Rights Act of 1964 reads in pertinent part as follows:

> (a) It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate or classify [its] employees

> or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a) (1982).

In 1978, Congress added the Pregnancy Discrimination Act ("PDA") to the definitional section of Title VII.. It provides in relevant part as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .

Id. § 2000e(k).

Congress enacted the PDA "'to prevent the differential treatment of women in all aspects of employment based on the condition of pregnancy.'" *EEOC v. Ackerman, Hood & McQueen,* 956 F.2d 944, 947 (10th Cir. 1992) (quoting *Carney v. Martin Luther*

Home, Inc., 824 F.2d 643, 646 (8th Cir. 1987)).[6] *See also California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 285-86 (1987) ("The Reports, debates, and hearings make abundantly clear that Congress intended the PDA to provide relief for working women and to end discrimination against pregnant workers.").

The PDA therefore requires courts to determine whether the employer treats pregnancy or pregnancy-related conditions differently than other conditions. *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) ("The 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.")

The New Jersey Law Against Discrimination similarly prohibits discrimination based on gender, race, religion or national origin, and recognizes that individuals have a civil right in not being discriminated against. N.J.S.A. 10:5-4. NJLAD provides as well that employers may not "because of the race . . . marital status or sex . . . of any individual . . . refuse to hire or employ or to bar or to discharge . . . from employment such individual. . . ." N.J.S.A. 10:5-12(a). The analysis of a claim under NJLAD is similar to that under Title

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[6]Congress took this legislative action after the Supreme Court, in *General Electric Co. v. Gilbert*, 429 U.S. 125-145-46 (1976), held that Title VII did not proscribe discrimination based on pregnancy. Pregnancy Discrimination Act of 1978, Pub. L. 95-555, § 1, 92 Stat. 2076, 2076 (1978).

VII. *See, e.g., Erickson v. Marsh & McLennan Co.,* 117 N.J. 539 (1990); *Shaner v. Horizon Bancorp.,* 116 N.J. 433 (1989); *Peper v. Princeton Univ. Board of Trustees,* 77 N.J. 55 (1978). *See also Abrams v. Lightolier Inc.,* 50 F.3d 1204, 1212 (3d Cir. 1995); *Khair v. Campbell Soup Co.,* 893 F. Supp. 316, 331 (D.N.J. 1995).

A Title VII claimant can demonstrate an alleged violation in either of two ways. First, a plaintiff can argue a disparate impact theory of discrimination. A disparate impact violation requires the claimant to show that the employer utilized a specific employment practice that, while facially neutral, caused "a substantial adverse impact on a protected group, and which cannot be justified as serving a legitimate business goal of the employer." *EEOC v. Metal Service Co.,* 892 F.2d 341, 346 (3d Cir. 1990). *See also Wards Cove Packing Co., Inc. v. Atonio,* 490 U.S. 642, 644 (1989). The claimant need not prove that the employer intended to discriminate. *Wards Cove Packing,* 490 U.S. at 644; *Metal Service Co.,* 892 F.2d at 346-47. Under the disparate impact theory, a statistical imbalance alone will not suffice; plaintiff must point to a specific discriminatory hiring or employment practice. *See Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 994 (1988) ("[W]e note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged. . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view

responsible for isolating and identifying the specific employment practices that are allegedly responsible for any statistical disparities.").[7]

Alternatively, a plaintiff may establish that she suffered discrimination under the disparate treatment analysis. To establish a disparate treatment violation, an individual of a protected group must demonstrate that she was singled out and treated less favorably than similarly situated colleagues because of an impermissible criterion under Title VII. *Internat'l Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335-36 & n.15 (1977); *Metal Service Co.,* 892 F.2d at 347. "Unlike the disparate impact theory, proof of the employer's discriminatory motive is critical under this analysis." *Id.*

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[7]The Bankruptcy Court did not consider plaintiffs' Title VII claims under a disparate impact analysis. Appellant contends that the Bankruptcy court committed error in not doing so, stating that "[t]he Court improperly limited its analysis of the evidence to the disparate treatment method." Appellant's Brief at 17. However, she does not allege a facially neutral employment practice adversely impacting a protected group, nor a statistical imbalance in the CCA workforce, nor does she make any further argument regarding a disparate impact theory. Therefore, the Court can not find that the Bankruptcy Court committed error in finding no *prima facie* case under the disparate impact theory.

The means by which a plaintiff can establish disparate treatment will depend on the availability of direct evidence. If she can not establish intentional discrimination by the evidentiary equivalent of a "smoking gun," she may resort to the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 254-56 (1981), which allows the plaintiff to establish a Title VII violation through circumstantial evidence. *See Smith v. F.W. Morse & Co., Inc.,* 76 F.3d 413, 420-21 (9th Cir. 1996); *Carney v. Martin Luther Home, Inc.,* 824 F.2d 643, 648 (8th Cir. 1987) (noting that the *McDonnell Douglas* test is inappropriate where there is direct evidence of discrimination).

A plaintiff bringing a Title VII or NJLAD claim for disparate treatment via circumstantial evidence must first set forth a prima facie case by showing that: (1) she is a member of a protected class; (2) she was qualified for the position of employment from which she was terminated; (3) she suffered some sort of adverse employment action; and (4) there was some causal nexus between the adverse employment action and plaintiff's status as a member of the protected class. *McDonnell Douglas Corp.,* 411 U.S. at 802-05; *Andersen v. Exxon Co., U.S.A.,* 89 N.J. 438, 492 (1982) (adopting the *McDonnell Douglas Corp.* test). *See also Gorham v. Amer. Tel. & Tel Co.,* 762 F. Supp. 1138, 1143 (D.N.J. 1991). In the context of the PDA,

> a plaintiff can establish a prima facie case of pregnancy discrimination by showing that (1)

> she is pregnant (or has indicated an intention to become pregnant), (2) her job performance has been satisfactory, but (3) the employer nonetheless dismissed her from her position (or took some other adverse employment action against her) while (4) continuing to have her duties performed by a comparably qualified person.

Smith, 76 F.3d at 421 (citations omitted).

In a pretext case, after plaintiff has established her prima facie case, the burden shifts to defendant to advance a legitimate, nondiscriminatory justification for its actions. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 515-16 (1993); *Burdine*, 450 U.S. at 252-54. See also *McKenna v. Pacific Rail Service,* 32 F.3d 820 (3d Cir. 1994) (predicting that the New Jersey Supreme Court would adopt the United States Supreme Court's decision in *St. Mary's Honor Center v. Hicks).* If defendant carries its burden, any presumption of discrimination drops from the case, and plaintiff must prove that the justifications proffered by defendant were merely a pretext for discrimination. *Burdine,* 450 U.S. at 256 (holding that plaintiff must then satisfy ultimate burden of proving discrimination "by showing that the employer's proffered explanation is unworthy of credence"); *Griffiths,* 988 F.2d at 469; *Lockhart v. Westinghouse Credit Corp.,* 879 F.2d 43, 49 (3d Cir. 1989). In this sense, it should be noted that "the defendant, rather than attempting to prove an affirmative defense, supplies an explanation." *Griffiths,* 988 F.2d at 469. It is not enough for plaintiff to shed

doubt on the proffered nondiscriminatory justification advanced by the employer; rather, the plaintiff must establish her theory of intentional discrimination. *Mardell v. Harleysville Life Insur. Co.*, 31 F.3d 1221, 1225 (3d Cir. 1994); *Sorba v. Pennsylvania Drilling Co.*, 821 F.2d 200, 202 (3d Cir. 1987), *cert. denied*, 484 U.S. 1019 (1988). That the factfinder might reject the proffered nondiscriminatory reason does not compel a verdict for the plaintiff, who still must prove that the illegitimate factor was a determinative reason for the adverse employment action. *Mardell*, 31 F.3d at 1225 (citing *Hicks*, 113 S. Ct. at 2749).

In a mixed-motive case, plaintiff seeks to prove that the adverse employment decision was a consequence of both legitimate reasons and discriminatory motives. *Griffiths v. Cigna Corp.*, 988 F.2d 457, 469 (3d Cir.), *cert. denied*, 114 S. Ct. 186 (1993). The plaintiff asserts not that legitimate reasons proffered by the employer were untrue or not a factor in the employer's action, but that other, discriminatory motives were also factored into the decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-45 (1989). A plaintiff in a mixed-motives case relying on circumstantial evidence, to shift the burden to the employer, must tie the evidence directly to the alleged discriminatory animus. *See Ostrowski v. Atlantic Mutual Insur. Co.*, 968 F.2d 171, 182 (2d Cir. 1992) ("[P]urely statistical evidence would not warrant [shifting the burden]; nor would evidence merely of the plaintiff's qualification for and the availability of a given position; nor would 'stray' remarks in the working place by persons who are not involved in the pertinent decisionmaking.") *See also*

Hook v. Ernst & Young, 28 F.3d 366, 373-74 (3d Cir. 1994) ("Absent evidence that could 'fairly be said to "directly reflect"' the alleged unlawful basis, the case should be treated as a pretext case.") (quoting *Griffiths,* 988 F.2d at 470; *Ostrowski,* 968 F.2d at 181-82).

If the mixed-motives plaintiff bears her initial burden of establishing a *prima facie* case of employment discrimination, defendant may avoid liability by showing that it would have reached the same decision even had the forbidden consideration not been a factor in the employment action. *Price Waterhouse,* 490 U.S. at 243-44; *Ezold v. Wolf, Schorr & Solis-Cohen,* 983 F.2d 509, 521-22 (3d Cir. 1992).

C. RHETT'S APPEAL

1. *Direct Evidence*

Rhett first contends that the Bankruptcy Court should have measured her claims against the direct evidence standard. She posits that with respect to her claims of discharge due to race and gender discrimination, the Bankruptcy Court should have applied the standards for either a direct evidence or a mixed-motives situation. Rhett makes a similar argument with respect to whether CCA's failure to consider her for other positions violated Title VII and NJLAD.

Rhett argues that several factors established direct evidence of discrimination of gender discrimination in

violation of the PDA.[8] First, she points to the Bankruptcy Court's finding that "the uncontradicted testimony of the debtor establishes that the debtor had to let someone in the secretarial group go and the fact that Rhett was not working for the company at the time made it logical that she be the one." Appellant's Brief at 28 (quoting Memorandum Opinion of William H. Gindin, C.J., U.S.B.C., Appellant's Appendix Vol. I, at 15). Appellant also insists that direct evidence of discrimination lies in CCA's "selection of Rhett for termination for the sole reason that she was the one on pregnancy leave is evidence of direct discrimination against her." *Id.* at 29. Finally, appellant asserts that CCA's failure to consider her for other employment positions, "in contradiction of its policy," evidences direct discrimination.

As noted *supra*, the Bankruptcy Court determined that plaintiff had introduced no evidence to establish that CCA discriminated against Rhett based on her pregnancy or her race. *See supra* pages 5-6 (quoting Memorandum Opinion of William H. Gindin, C.J., U.S.B.C., Appellant's Appendix Vol. I, at 14). Thus, while it may be that the Bankruptcy Court did not

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[8]Rhett has evidently disregarded her direct evidence theory of racial discrimination in this appeal. She fails to reference any direct evidence that the Bankruptcy Court might have overlooked in determining there was no racial discrimination; nor does she point to any other instance of error by the Bankruptcy Court in this regard. *See In re Abijoe Realry (sic) Corp.*, 943 F.2d 121, 123 n.1 (1st Cir. 1991).

specifically assess Rhett's claims against the direct evidence standard, it is clear that had the Court done so, it would have reached the same conclusion. The issue is thus whether the Bankruptcy Court erred as a matter of law in concluding that the foregoing factors did not directly evidence discrimination.

If Rhett established a *prima facie* case of direct discrimination, a second issue would arise as to whether the Bankruptcy Court erred by failing to shift the burden of persuasion to defendant and requiring CCA to establish, through the production of credible evidence, that it would have made the same decision even if it had not taken the protected characteristic into account. *Smith*, 76 F.3d at 421; *Robinson v. Southeastern Pennsylvania Transportation Authority*, 982 F.2d 892, 899 (3d Cir. 1993). The defendant would nonetheless remain liable for declaratory relief, injunctive relief, attorney's fees and costs of suit. *See infra* note 9. The burden would shift to CCA only if Rhett established a *prima facie* case of direct discrimination.

This Court agrees with the Bankruptcy Court that Rhett did not establish a *prima facie* case of direct discrimination on the basis of either her race or her gender. While she refers repeatedly to an established policy of rehiring employees on leave, it is clear the policy, if any, was merely an informal one by which CCA would rehire individuals if the circumstances at the time of the employee's return warranted doing so. Appellant has produced no written employment handbook or other policy declaration in which CCA

guarantees that an employee returning from leave, pregnancy or otherwise, will be rehired. Moreover, the testimony adduced at trial from appellant's former colleagues reinforces the Bankruptcy Court's conclusion that no such formal policy existed. *See, e.g.,* Testimony of Brenda Sirkis, Appellant's Appendix Vol. I, at 38-15 to 38-18 ("Q: When you left to have your baby, do you know whether or not the position was available to you two years later when you went back? A: No. It wasn't discussed."); Testimony of Gary Turndorf, Appellant's Appendix Vol. II, at 93-2 to 93-9 ("[A]part from pregnancy, I can't think of a case where people left for any prolonged interval, apart from just leaving. And so in the case of pregnancy, if an employee indicated a desire to come back, we would try and hold it open for them if we could, and hold it open. When they wanted to come back, if they contacted us and there was something open that was suitable, we would offer it to them."). Thus, the crux of appellant's direct discrimination case—that CCA breached a formal policy of rehiring employees ready to return from maternity leave because appellant was unmarried and on pregnancy leave—is entirely unsubstantiated. CCA had no formal leave policy and it sought to hold her position open for several months after she left in December, 1990. Additionally, it abolished the position only after she had already given birth and was ready to return, not while she was still pregnant.

The only other evidence to which appellant points in support of her direct discrimination theory are comments allegedly made by Turndorf and Gormisky when she told them of her pregnancy. These are insufficient to support a direct discrimination claim. It

is well settled that stray remarks in the workplace, particularly by those who do not have authority to make personnel decisions such as Gormisky and Turndorf, *see supra* page 2, do not establish a *prima facie* case of direct discrimination. *Hook*, 28 F.3d at 373, *Ostrowski*, 968 F.2d at 182. Thus, with respect to Rhett's direct discrimination case, we agree with the Bankruptcy Court that there was no evidence that anyone with authority to hire or fire CCA personnel discriminated against her. It follows that the Bankruptcy Court did not err in not requiring defendant to establish that it would have made the same employment decision had it not taken the impermissible criterion into account.

The remaining facts to which appellant points in support of her direct discrimination case, including the abolition of her position while she was still on leave and CCA's failure to consider her for other positions, are by no means directly discriminatory and will be considered *infra*.

2. *Application of* McDonnell Douglas *Factors*

Appellant also challenges the Bankruptcy Court's conclusion that plaintiff failed to establish a *prima facie* case of discrimination, based on either race or the PDA, under *McDonnell Douglas*. Plaintiff's first argument in this regard is that the Bankruptcy Court erred as a matter of law in applying the *McDonnell Douglas* standard here because that test applies only to failure-to-hire, not discharge, claims. Although Rhett contends that the Bankruptcy Court should have applied a modified standard, Appellant's Brief at 18,

she fails to identify those standards. In any event, this argument is meritless, as the Supreme Court injected no such limitation in *McDonnell Douglas,* and numerous subsequent decisions have utilized that test in discharge cases. *See, e.g., Smith,* 76 F.3d at 420-21 (applying *McDonnell Douglas* test to claims of wrongful discharge and failure to rehire under PDA); *Griffiths v. CIGNA Corp.,* 988 F.2d 457, 468-69 (3d Cir.) (applying *McDonnell Douglas* test to pretext claim for discharge), *cert. denied,* 114 S. Ct. 186 (1993); *Jackson v. Univ. of Pittsburgh,* 826 F.2d 230, 233-34 (3d Cir. 1987) (same), *cert. denied,* 484 U.S. 1020 (1988). Additionally, her claims appear to present a failure to rehire case as much as they do one for discharge, particularly since there was unrebutted testimony at trial that CCA did not consider her to be an employee there on March 26, 1991 when Gormisky notified her that CCA abolished her position. Testimony of Gary Turndorf, Appellant's Appendix Vol. II, at 70-1 to 70-4 ("Well, let go is a funny way to put it in the case of Ms. Rhett, because we considered that she was not an employee at the time that we terminated that position or contracted that part of the company.").

The next issue is whether the Bankruptcy Court correctly held that CCA's decision to abolish the secretarial position that appellant had held, because she was out on maternity leave when CCA decided to contract the support staff, did not establish a case of pretextual discrimination. The Ninth Circuit had occasion to consider a similar issue in *Smith v. F.W. Morse & Co., Inc.,* 76 F.3d 413, 424-425 (9th Cir. 1996). In that case, plaintiff Kathy Smith was employed as a

manager with defendant F.W. Morse & Co., a manufacturer of custom components for high technology. *Id.* at 418. In December, 1988, she told defendant that she intended to take maternity leave in or around April, 1989. *Id.* Between December, 1988 and April, 1989, F.W. Morse & Co. underwent a management reorganization that reduced the number of second-level managers from seven to five. *Id.* As Smith was about to begin maternity leave, the owner of F.W. Morse, which had no formal maternity policy, assured her that her position was secure. *Id.*

On May 1, 1989, Smith visited the plant and told the general manager that she would like to return to work earlier than expected. *Id.* at 419. The general manager asked Smith whether she wished to have more children, to which Smith responded affirmatively. *Id.* The following day, the general manager asked Smith's sister, also a plant employee, about Smith's plans to have a larger family. *Id.* When Smith learned of this conversation and confronted the general manager about it, the general manager assured Smith her position was secure. *Id.* However, on May 11, 1989, the general manager informed Smith that her position was superfluous and had been eliminated. *Id.*

The district court entered judgment for defendant, and Smith appealed arguing, *inter alia,* that her absence on maternity leave was the primary motivating factor in her discharge and that F.W. Morse & Co. consequently discriminated against her in violation of Title VII and the PDA. *Id.* at 424. The Ninth Circuit disagreed, noting that while Title VII prohibits an employer from

discharging an employee in retaliation for taking maternity leave, *see* 42 U.S.C. § 2000e(k), "an employer may discharge an employee while she is on a pregnancy-induced leave so long as it does so for legitimate reasons unrelated to her gravidity." *Id.* The Ninth Circuit stated as follows:

> Title VII mandates that an employer must put an employee's pregnancy (including her departure on maternity leave) to one side in making its employment decisions—but the statute does not command that an employer bury its head in the sand and struthiously refrain from implementing business judgments simply because they affect a parturient employee. . . . At bottom, Title VII requires a causal nexus between the employer's state of mind and the protected trait (here, pregnancy). The mere coincidence between the trait and the employment decision may give rise to an inference of discriminatory animus . . . but it is not enough to establish a per se violation of the statute. . . . [The] employee (pregnant or not) runs a risk of suffering the ordinary slings and arrows that suffuse the workplace every day she goes to work and every day she stays away. Title VII is neither a shield against this broad spectrum of employer actions nor a statutory guaranty of full employment, come what may.

Smith, 76 F.3d at 424-25. *See also Troupe v. May Dep't Stores Co.,* 20 F.3d 734, 738 (7th Cir. 1994) (holding that the PDA "requires the employer to ignore an employee's pregnancy, but . . . not her absence from

work"); *Crnokrak v. Evangelical Health Systems Corp.*, 819 F.Supp. 737, 743 (N.D. Ill. 1993) (noting that "the PDA does not force employers to pretend that absent employees are present whenever their absences are caused by pregnancy").

Similarly, in this case, the Bankruptcy Court reached several factual findings, which are reviewed only for clear error, that compelled the conclusion that the secretarial position held by appellant was abolished for legitimate, non-discriminatory reasons. That CCA was experiencing severe financial difficulties by 1990 and through 1991 is manifest from the record and further reflected by CCA's current Chapter 11 status. As a result, CCA contracted its staff on both management and support staff levels, and decreased or froze the remaining executives' salaries. Based on these factual findings, which are not clearly erroneous, the Court agrees that appellant's "discharge" claim under Title VII is meritless.

The Bankruptcy Court also found as matter of fact that appellant was not qualified for the administrative assistant, accounts payable supervisor or property manager positions. The Bankruptcy Court stated as follows:

> [T]he testimony of the debtor, through the statements of Turndorf, make it clear that she was not qualified for any of those jobs. Each of the positions required personal qualities that Rhett had not previously demonstrated. In the case of the administrative assistant, the basic requirement of the job was to act as an

> assistant to Landis. He required someone who worked with him and anticipated his requirements. Appointment to this position was his choice and it cannot be said that Rhett showed any of those qualities which he required. With respect to the job of accounts payable supervisor, it was clear from the cross examination of Rhett that she did not understand the nature of the position. As indicated in the findings of fact, she claimed not to know that the company was in trouble. As in many situations where a company is on the brink of financial collapse, the accounts payable supervisor clearly requires juggling skills in the handling of trade creditors. One who could not consider the grave financial problems of the debtor certainly could not make the decisions with respect to the priorities of payment. There was also some suggestion that Rhett might be able to function as property manager. There was no evidence that she was even remotely qualified for that position.

Memorandum Opinion of William H. Gindin, C.J., U.S.B.C., Appellant's Appendix Vol. I, at 13-14.

The record and testimony adduced at trial before the Bankruptcy Court support these conclusions. The foregoing review of the Bankruptcy Court's decision therefore compels the Court to reject appellant's contention that the Bankruptcy Court failed to consider whether she established a pretextual discharge case. The bulk of the Bankruptcy Court's analysis clearly

involved an application of the *McDonnell Douglas* standard and culminated in the Bankruptcy Court's conclusion that she had not satisfied those factors and thus not succeeded in demonstrating pretextual discrimination. *See* Memorandum Opinion of William H. Gindin, C.J., U.S.B.C., Appellant's Appendix Vol. I, at 12-14.

The Court is similarly constrained to reject Rhett's argument that the Bankruptcy Court failed to consider her circumstantial case of racial discrimination under the *McDonnell Douglas* standards. Appellant has referenced no factual or legal error by the Bankrutpcy Court in this regard, beyond an amorphous assertion that three of the other secretaries were white and other individuals who remained at CCA after the staff reductions were white. Even if this allegation were sufficient to constitute a statistical imbalance, which it is not, it is well settled that a statistical imbalance alone will not suffice to establish a *prima facie* disparate impact or circumstantial case of discrimination. *See supra* pages 9-10 (quoting *Watson,* 487 U.S. at 994). *See also Griffiths,* 988 F.2d at 470; *Ostrowski*, 968 F.2d at 182.

3. *Mixed-Motives Standard*

Finally, appellant argues that the Bankruptcy Court did not properly apply the standard for a mixed-motives claim of discrimination. While appellant argues that

the Bankruptcy Court misstated the standard,[9] we can find no reversible error here. Having concluded that CCA did not discriminate against plaintiff under the PDA in abolishing her position while she was on leave or in not hiring her for another position, the Bankruptcy Court found no discriminatory animus that tainted an otherwise legitimate business decision. For the reasons set forth above, *supra* pages 16-19, this Court agrees.

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[9]Relying on *Price Waterhouse*, the Bankruptcy Court stated that even if the employer took the protected characteristic into account in rendering the adverse employment decision, it could escape liability upon a showing that had the employer not, the result would have been the same. Memorandum Opinion of William H. Gindin, C.J., U.S.B.C., Appellant's Appendix Vol. I, at 15 (citing *Price Waterhouse,* 490 U.S. at 242). The Civil Rights Act of 1991, however, partially overruled *Price Waterhouse* by providing that even if the employer demonstrates that it would have reached the same decision absent discriminatory motive, the aggrieved party might still recover declaratory and injunctive relief, attorneys' fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B), as amended by the Civil Rights Act of 1991, section 107(b). *See also Robinson v. Southeastern Pennsylvania Transportation Authority,* 982 F.2d 892, 899 (3d Cir. 1993).

III. CONCLUSION

For the reasons set forth above, the Court will affirm the January 9, 1996 Order of the Bankruptcy court in all respect. An appropriate form of Order is filed herewith.

GARRETT E. BROWN, JR., U.S.D.J.

Opinion of the Bankruptcy Court

HONORABLE WILLIAM H. GINDIN, CHIEF JUDGE

PROCEDURAL HISTORY

This matter comes before the court on a motion by the debtor (Carnegie or debtor) to expunge the claim of Deborah Rhett (Rhett or creditor) in the amount of $150,000.00 based upon a claim of discrimination on the part of the debtor. The creditor claims that the debtor failed to permit her to return to work after she gave birth to her child because she was (1) black, (2) unmarried, and (3) away from work for more than three months as a result of her pregnancy and delivery. After the hearing, the court determined that the matter was a "contested matter" as defined by *Fed. R. Bankr. P. 9014,* that it should proceed in the same manner as an adversary proceeding, and that Part VII of the said rules should apply. This court has jurisdiction pursuant to the provisions of 28 U.S.C §1334(b) and 28 U.S.C. §157(b)(2)(B) & (O).

FACTS

The matter was heard by the court on October 20, November 29 and November 30, 1995. The creditor offered one witness, Brenda Sirkus (Sirkus), in addition to herself (Rhett), as well as portions of a deposition taken of the debtor's witnesses. The debtor relied upon the testimony of Gary Turndorf (Turndorf), Chief

Financial Officer and Counsel to the debtor, as well as Keith Gormisky (Gormisky), Controller of the debtor partnership.

As a result of the aforesaid testimony, the court makes the following findings of fact:

1. Carnegie is one of a number of entities owned or controlled by one Alan Landis (Landis) and operated from one office located in Carnegie Center, Princeton (West Windsor), New Jersey. Some of the entities are debtors before this court while others are not.

2. Landis controls all of the entities and makes all of the significant decisions concerning hiring, firing, and compensation. Neither Turndorf or Gormisky had any hiring or firing authority.

3. Rhett is a black woman, now approximately thirty-five years old and in apparent good health.

4. Rhett was employed by Carnegie as a temporary employee beginning in March or April of 1989.

5. Rhett is a graduate of Burlington High School and has extensive employment experience as an accounting clerk, billing clerk, payable clerk, and secretary. She has experience in dealing with clients over the telephone and working on continuity for a radio station. She also has brief experience in retail, including the supervision of some part-time employees.

6. On July 17, 1989, she became a permanent secretary with the debtor. As a secretary, her duties

included typing of correspondence, statistical typing, answering the telephone, filing, and other secretarial duties. On occasion, she did some ordering of supplies and directed messages of tenant complaints to the appropriate executive. She specifically worked for several executives, including Geoff Hammond (Hammond).

7. The operation of Carnegie was very loose. There were a limited number of employees and all secretaries and office personnel covered for one another to the extent that they were able.

8. In January of 1990, Rhett received an increase of $1,500.00 in her salary, bringing her to $25.000.00. During 1990, she also received an additional $5,000.00 in overtime. Benefits were minimal, but they included a health plan and a small pension plan to which she was required to contribute if she wished to participate. She received two weeks of vacation which she took in daily increments and some sick time which she rarely used. She was allowed no personal days. On occasion, she did extra typing for others and was given her lunch in lieu of payment.

9. Rhett's job performance was adequate, and she was never told that it was deficient in any way. She apparently never received a performance review.

10. The procedure was that staff employees were given annual raises of 3 to 4%. If their performance was exceptional, more could be given.

11. In the summer of 1990, Rhett felt that she was

doing more work than she had done when she started and requested a salary increase. She was assured that her request would be given consideration, but she never heard and did not receive a raise.

12. Kristen Wolf (Wolf) was given a retroactive increase of $2,000.00 on April 18, 1990, (Exhibits J-1 and J-2 in evidence) and a further increase of 4% on March 29, 1991 (Exhibit P-12 in evidence). Both of these increases were approved by Landis.

13. Evelyn Angulites (Angulites) was a secretary employed at the time Rhett started working at Carnegie. While she held herself out as the one in charge of the office, she had in fact, no more authority than any other secretary. She did some additional ordering of supplies, but only because she was more familiar with the routine. When she left in the summer of 1990, Rhett took on some of her tasks.

14. Wolf started as a receptionist at the same time Rhett started on a full time basis. In December 1990, Wolf was designated as a secretary and worked for several senior people. She later became an administrative assistant.

15. Barbara MacGregor (MacGregor) served as personal secretary to Landis and, as such, worked for him in many different ways. She had a longer tenure in the job than Rhett had in her job. When she left, she was replaced by Rachel Drexinger (Drexinger). When she sought to return, it coincidentally came at the time Drexinger was about to leave voluntarily and she was given her job back.

16. Kathy Buchanan, was also a secretary and had been employed longer than Rhett.

17. Sirkus left in order to have a baby and returned as a temporary employee.

18. Kathleen Cohen (Cohen) was also a personal secretary and administrative assistant to Landis. She exhibited special skills in handling that job. She was replaced by Tammi Medoff when she left in April, 1991.

19. Linda Kraus (Kraus) was an accounts payable supervisor when she left to have a baby. When she returned, she was employed as an accounts payable clerk.

20. There were two other black employees in the Landis groups; one was a supervisor. There were approximately 25 employees in the entire group.

21. Rhett was not qualified to be an accounts payable supervisor, an administrative assistant as described in C-6, or a private secretary to Landis.

22. In June of 1990, Rhett informed her co-workers and supervisors that she was pregnant, and that she would be looking to take maternity "leave".

23. Carnegie has no regular maternity "leave" policy. As a rule, the debtor tries to rehire or find a spot for any employee to the best of its ability when the person returns.

24. When Rhett told Gormisky that she was going to have a baby, he asked her if she was going to get married. When she told him that she was not, he remarked that she would be better off married. Gormisky knew that she had a boyfriend who was already married.

25. Turndorf did not think that Rhett was a good employee and in December 1990, he told her that she was on "thin ice". Rhett stated that she thought that this had to do with her return to work, but it appears from the feelings that Turndorf had about her work, that he was telling her that her work was not as good as it should be.

26. On December 18, 1990, Rhett advised the people for whom she worked that she was leaving on "maternity leave" on December 21, 1990, and that she planned to return on April 15, 1991. Copies of her memorandum were sent to several executives including Turndorf and Landis. She made it clear that she wanted to return. Rhett received no response to her memorandum. It is also clear that Rhett was happy in her job and felt that she was a good employee who had no reason to believe that she could not come back.

27. Rhett left on December 21, 1990. Before she left, she trained a temporary employee to take her place. The temporary employee remained until March, 1991.

28. Carnegie was one of several Landis companies which was formed for the financing and administration of single asset real estate holdings. Beginning with the

downturn in real estate in New Jersey in 1987, the companies began to experience severe financial difficulties. The existence of such difficulties was known to all employees. Sirkus knew and, in spite of a specific claim to the contrary, this court finds that Rhett knew of the trouble.

29. In December, 1990, several supervisory employees, including Hammond, were let go. Eugene Gold was let go in March of 1981, Dave O'Conner in April, 1991, and Peter Clark in June of 1991. All salaries were frozen and executives took a substantial decrease in salaries.

30. During the time before Rhett left, there had been many calls from vendors to whom money was owed seeking payment of outstanding bills.

31. While Rhett was out, Carnegie tried to keep Rhett's position open for as long as it could with temporary employees.

32. In early March, Rhett visited the premises of Carnegie to show her baby to her co-workers. Nothing was said to her at that time about termination.

33. On March 26, 1991, Gormisky wrote to Rhett telling her that her position had been eliminated (Exhibit C-5 in evidence). This was the first time that Rhett had knowledge that she would not have a job.

34. Immediately upon receipt of the letter from Gormisky, Rhett called him. Gormisky just reiterated the contents of the letter. Rhett also asked about the

accounts payable position, but she was told that it was not available to her. She asserts that she asked about the administrative assistant position and the court finds that she was told that it was not available to her. The court also finds that Rhett did not indicate that she would take a lower paying or temporary job, and she was not asked.

35. After the letter of March 26, Carnegie sent the necessary information concerning the continuing benefits (COBRA) to Rhett.

36. Rhett suffered from some form of post-partum depression and was under medical care until June 1991. No evidence was adduced indicating a relationship between the medical care and her termination other than the testimony from Rhett that she was hurt and embarrassed and has yet to tell her family that she was terminated.

37. For the year of 1991, Rhett earned $11,873.00 of which $8,740.00 was in unemployment benefits. (Stipulated).

38. On January 29, 1992, Rhett commenced work for the Robert Wood Johnson Foundation. She earned $22,500.00 in 1992; $23,000.00 in 1993; $24,000.00 in 1994; and $25,500.00 in 1995. In addition, she has had more vacation time, more sick time and the right to take personal days. She has a significantly better health plan than she had at Carnegie and a drug plan where previously she had none. She gets life insurance and a noncontributing 401k plan which has a present value in excess of $9,100.00. Most valuable of all is that her

compensation package includes a free lunch. Rhett loves her job and considers it better than the one she left.

39. There is not a scintilla of evidence that any person at Carnegie who had the power to hire or fire, discriminated against Rhett on the basis of her race. The evidence is to the contrary.

40. There is not a scintilla of evidence that any person at Carnegie who had the power to hire or fire discriminated against Rhett on the grounds that she was a single and/or unwed mother. The evidence is to the contrary.

41. A timely complaint was brought by Rhett before the Equal Employment Opportunity Commission which declined to take action.

DISCUSSION

N.J.S.A. 10:5-4 prohibits discrimination on the basis of race. It further provides that the right not to be discriminated against "is recognized as and declared to be a civil right." *Id.* Furthermore, *N.J.S.A. 10:5-12(a)* prohibits "an employer, because of the race ... marital status or sex ... of any individual ... to refuse to hire or employ or to bar or to discharge ... from employment such individual ..." The law of New Jersey is clear. *42 U.S.C. § 2000e-2(a)* defines the same conduct as an "unlawful employment practice." Additionally, *42 U.S.C. 2000e(k)* defines sex to include "pregnancy, childbirth or related medical conditions." The federal

law is likewise clear. The question before this court is whether or not Deborah Rhett found herself without a job because of her race or her position as an unwed pregnant woman who left her job to have her child.

To the extent that the statutes require some act or statement to establish such discrimination, none has been shown in this case. The issues are, however, far more complex. Initially, it must be noted that an action before the Equal Employment Opportunity Commission is a jurisdictional prerequisite to the filing of the claim in this action. An adverse decision or a failure to act by the Commission, however, does not preclude the assertion of a claim in this court. *McDonnell Douglas Corporation v. Green, 411 U.S. 792, 798, 93 S.Ct. 1817, 1822 (1973); Fekete v. United States Steel Corp., 424 F.2d 331, 1336 (3d Cir., 1970).*

There are two basic approaches to the determination of discrimination which must be analyzed. The first of these is known as the disparate impact theory of racial discrimination. A violation of the statute based upon this theory is shown when an employer uses a specific employment practice which, although it appears to be neutral on its face, actually causes a "substantial adverse impact upon a protected group." *Equal Opportunity Employment Commission v. Metal Service Company, 892 F.2d 341, 346 (3rd Cir., 1990).* It must appear that the practice does not serve a legitimate goal of the employer. *Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 659, 109 S.Ct. 2115, 2126 (1989).* The burden of proof of such disparate impact must be shown by the complainant, and the employer need only produce a legitimate business

justification. *Id.* Under this theory, there is no need for proof of intentional discrimination. *Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 985, 108 S.Ct. 2777, 2784 (1988); Wards Cove, Supra at 645.*

The disparate treatment theory takes a different approach. Under this alternative claim, the employee must show that he or she is a member of a protected group, and that the particular employee has been "singled out and treated less favorably than others similarly situated on the basis of an impermissible criterion." *Metal Service Company, Supra* at *347.* In this type of case, the employee must make a prima facie case showing that the employer's motive was discriminatory. *Id.* No such proof was forthcoming in the trial of the case at bar. In fact, Rhett's testimony is to the contrary. She felt that there was no discrimination against blacks, and while there were few blacks in the firm, they were well treated. In fact, a black was promoted to a supervisory role in a related Landis company. As to the issue of whether Rhett was treated differently as a single pregnant woman, the only evidence adduced at trial clearly showed that an individual who left to have a baby had no absolute right to keep her job. In fact, the debtor here tried to keep the position for her, but was unable to do so.

The *McDonnell Douglas* case also establishes the necessary burden of proof and elements of the cause of action. The complainant must show:

> (i) that he belongs to a racial minority, (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that,

> despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, Supra at 802. Each of these elements must be examined in the light of the testimony adduced at the trial. The first prong of the test is easy. Rhett is black and is clearly a member of a racial minority. As an unwed pregnant woman leaving work to have her baby, she likewise fits into a group against which discrimination might take place. The second prong is less clear. There was no evidence adduced at trial that the employer was actually seeking applicants. While the position was apparently kept open until the time that the debtor sent the letter indicating that her job had been eliminated, it is clear that after March 26, 1991, there were only four secretaries where there had previously been five. The debtor filled other positions such as the administrative assistant and accounts payable supervisor slots, but no one was hired as a secretary.

Rhett argues that she was qualified for the positions of administrative assistant, accounts payable supervisor, or property manager. However, the testimony of the debtor, through the statements of Turndorf, make it clear that she was not qualified for any of those jobs. Each of the positions required personal qualities that Rhett had not previously demonstrated. In the case of the administrative assistant, the basic requirement of the job was to act as an assistant to Landis. He required someone who worked with him and

anticipated his requirements. Appointment to this position was his choice and it cannot be said that Rhett showed any of those qualities which he required. With respect to the job of accounts payable supervisor, it was clear from the cross examination of Rhett that she did not understand the nature of the position. As indicated in the findings of fact, she claimed not to know that the company was in trouble. As in many situations where a company is on the brink of financial collapse, the accounts payable supervisor clearly requires juggling skills in the handling of trade creditors. One who could not consider the grave financial problems of the debtor certainly could not make the decisions with respect to priorities of payment. There was also some suggestion that Rhett might be able to function as property manager. There was no evidence that she was even remotely qualified for that position. The final part of the test deals with the question of whether or not the employer continued to seek applicants. It is clear beyond any doubt that the employer did not continue to seek applicants. In fact, the debtor, whom it was testified hated to fire anyone, let several administrative and executive employees go and downsized the entire operation in an effort to cut costs.

Assuming *arguendo* that the complainant had made out a *prima facie* case of all four of the *McDonnell Douglas* requirements, the burden of proof shifts "to the employer to articulate some legitimate, nondiscriminatory reason" for its action. *Id.* Such a reason must, in the words of Justice Powell, "be recognized as a reasonable basis for a refusal to hire." *Id. at 802-3.* This court, dealing as it does with insolvent and failing businesses on a daily basis, can

think of no more legitimate reason for a discharge than the necessity of reducing the work force of a company in trouble. While it is clear that the company did not take final action until such time as Rhett was almost ready to return, the evidence was that three of the people for whom Rhett did significant work were let go in December, 1990, March 1991 and April, 1991. It should be noted that even if the trier of the fact is unable to accept the justification set forth by the debtor (certainly not the case here), there is not necessarily a requirement that the court find discrimination without full compliance with the requirements of the burden of proof. *St. Mary's Honor Center, et al. v. Hicks, 113 S.Ct. 2742, 2755, 125 L.Ed.2d. 407 (1993).* Even the four dissenting justices in that case concede that the burden of showing that the explanation proffered by the employer is "unworthy of credence," remains on the one complaining of the discrimination. *St. Mary's, Supra at 2762; Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252, 101 S.Ct. 1089, 1093 (1981); See also, McKenna v. Pacific Rail Service, 32 F. 3rd 820, 825-6 (3rd Cir., 1994).*

It is also important to note that the Supreme Court in *Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775 (1989)* dealt with the problem which arises when the discrimination forms a portion of the reason for the action by the employer. There, Justice Brennan speaking for a six to three majority, rejected a "but for" test, and insisted that the employer show by a preponderance of the credible evidence that even if the employer had not taken the protected class situation, the result would have been the same. *Price Waterhouse,*

Supra at 242. Thus in the instant case, the uncontradicted testimony of the debtor establishes that the debtor had to let someone in the secretarial group go and the fact that Rhett was not working for the company at the time made it logical that she be the one.

In view of the determination of the factual issues by the court, it is unnecessary to make conclusions concerning the damage issues raised by Rhett.

CONCLUSION

Based upon the findings of fact and conclusions of law set forth herein, this court find that the creditor, Deborah Rhett, has failed to establish her claim, and that the claim should and is hereby expunged.

Counsel for the debtor shall submit an appropriate form of order within ten days.

December 21st, 1995.

WILLIAM H. GINDIN
CHIEF JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5566

IN RE:

CARNEGIE CENTER ASSOCIATES,

Debtor

DEBORAH RHETT,

Appellant

v.

CARNEGIE CENTER ASSOCIATES

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 96-00852)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and WELLFORD*, Circuit Judges

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The petition for rehearing filed by the appellant, Deborah Rhett, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Chief Judge Sloviter and Judges Mansmann, Nygaard, Roth, Lewis, and McKee would grant rehearing by the court en banc.

BY THE COURT:

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Circuit Judge

DATED: DEC 22 1997

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*Honorable Harry W. Wellford, Senior Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
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IN RE:

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v.

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On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 96-00852)

Present: Greenberg, McKee, and Wellford,*
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on June 23, 1997.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 6, 1996, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

Dated:

Certified as a true copy and issued in lieu of a formal mandate on December 30, 1997.

Teste: /s

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit.